TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 78

A. B. LEACH & COMPANY, INC., PETITIONER,

vs.

WALTER PEIRSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 7, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(22,006)

(32,003)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 436

A. B. LEACH & COMPANY, INC., PETITIONER,

vs.

WALTER PEIRSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, eastern Pennsylvania	1	1
Docket entries	1	1
Writ of error	2	2
Amended statement of claim	3	3
Supplemental affidavit of defense and counterclaim	8	7
Exhibit "A"—Promissory note executed by Walter Peirson	15	10
Reply	15	11
Bill of exceptions	16	11
Caption	16	11
Testimony of Walter Peirson	17	12
Plaintiff's Exhibit No. 1—Check Walter Peirson to A. B. Leach Co., June 25, 1920	23	17
Offer in evidence	24	18
Plaintiff's Exhibits Nos. 4 to 11, Inclusive—Letters from A. B. Leach Co. to Walter Peirson	25	18
Testimony of Joseph H. Stinger	36	27
Testimony of Walter Peirson (recalled)	45	35
Plaintiff's Exhibit No. 12—Letter from Walter Peirson to A. B. Leach Co.	47	36
Plaintiff's Exhibit No. 15—Note executed by Walter Peirson	50	39

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 8, 1926

	Original	Print
Plaintiff's Exhibit No. 16, Letter from A. B. Leach Co. to Walter Peirson	[illegible]	41
Plaintiff's Exhibit No. 17, statement to Walter Peirson, March 21, 1922	45	42
Plaintiff's Exhibit No. 18, Letter from Walter Peirson to A. B. Leach Co.	[illegible]	[illegible]
Plaintiff's Exhibit No. 19, Check, Walter Peirson to A. B. Leach Co., March 28, 1921	58	46
Plaintiff's Exhibit No. 20, Letter from Walter Peirson to A. B. Leach Co.	59	47
Offers in evidence	59	47
Testimony of Walter Peirson, Jr.	59	47
Edward D. C. Lynch	102	83
Francis J. Kierns, Jr.	104	85
Edward D. C. Lynch (recalled)	105	85
Motion for nonsuit	106	87
Testimony of Charles I. Mather	107	87
Testimony of Charles R. Miller	122	100
Defendant's Exhibits Nos. 1 to 3, Checks, A. B. Leach Co. to Walter Peirson	125	111
Defendant's Exhibits Nos. 4 and 5, Letters from A. B. Leach Co. to Walter Peirson	126	112
Testimony of Wallace McKeag	142	117
William H. Lentzler	145	119
Harry G. Preller	148	122
Edward D. C. Lynch (recalled)	149	123
Walter Peirson (recalled)	151	125
Defendant's requested instructions to jury	153	126
Charge to jury	156	127
Order settling bill of exceptions	162	132
Motion for new trial and reasons to support thereof	163	134
Supplemental reasons for new trial	166	136
Order denying motion for new trial	170	139
Praecipe for judgment	170	139
Judgment	170	140
Petition for writ of error and order allowing same	171	140
Assignments of error	174	141
Praecipe for transcript of record	177	143
Clerk's certificate (omitted in printing)	178	
Proceedings in United States circuit court of appeals, third circuit	179	144
Argument and submission (omitted in printing)	179	
Opinion, Buffington, J.	180	144
Judgment	185	149
Order denying petition for rehearing	185	150
Mandate	186	150
Order recalling mandate	190	152
Order vacating order denying petition for rehearing	191	152
Clerk's certificate (omitted in printing)	192	
Order allowing certiorari	193	153

[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, DECEMBER TERM, 1922

No. 9986

WALTER PEIRSON

v.

A. B. LEACH & Co., INC.

H. P. Brown, Esq.
Rawle & Henderson, Esqs.

DOCKET ENTRIES

Mar.	7,	1923.	Exemplified copy of record from C. P. 3 Philadelphia Co., Pa., received and filed.
May	14,	"	Affidavit of Defense, filed.
"	14,	"	Counter Claim, filed.
"	14,	"	Notice to file reply to Counter Claim, filed.
Sept.	20,	"	Plaintiff's reply to Counter Claim, filed.
Feb.	6,	1924	Stipulation of counsel to file amended Statement of Claim, filed.
"	6,	"	Amended Statement of Claim, filed.
"	11,	"	Jury called.
"	11,	"	Witnesses sworn.
"	11,	"	Jurors unable to agree and discharged without a verdict.
"	27,	"	Supplemental Affidavit of Defense and [fol. 2] Counter Claim, filed.
Feb.	27,	1924	Notice to file reply to Counter Claim, filed.
"	17,	1925	Jury called.
"	18,	"	Trial resumed—Witnesses sworn.
"	19,	"	Trial resumed—Witnesses sworn.
"	19,	"	Verdict for Plaintiff—Damages assessed at $14,726.25.
"	21,	"	Motion for Judgment N. O. V., filed.
"	21,	"	Motion and Reasons for New Trial, filed.
Mar.	28,	"	Supplemental Reasons for New Trial, filed.
April	16,	"	Argued sur Motions for New Trial and Judgment N. O. V.

"	30,	"	Order of Court denying Motion for New Trial, filed.
"	30,	"	Praecipe to enter Judgment, filed.
"	30,	"	Judgment in $14,726.25, filed.
May	1,	"	Bill of Exceptions, filed.
"	1,	"	Order of Court sealing Bill of Exceptions, filed.
"	8,	"	Bond sur Writ of Error in $20,452.50, filed.
"	8,	"	Order of Court approving Bond sur Writ of Error, filed.
"	9,	"	Assignments of Error, filed.
"	9,	"	Petition for Writ of Error, filed.
"	9,	"	Order of Court granting prayer of petition, filed.
"	9,	"	Copy of Notice of Appeal, filed.
"	9,	"	Praecipe as to transcript of record sur Writ of Error, filed.
"	11,	"	Writ of Error allowed and copy thereof lodged in Clerk's office for adverse party.
[fol. 3]			
May	11,	1925	Citation allowed and issued.
"	15,	"	Citation returned, service accepted and filed.
"	18,	"	Plaintiff's Reply to Supplemental Affidavit of Defense, filed.
"	18,	"	Defendant's Points for charge, filed.

IN UNITED STATES DISTRICT COURT

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between **Walter Peirson and A. B. Leach and Company, Incorporated, a** manifest error hath happened, to the great damage of the said A. B. Leach and Company, Incorporated, as by its

complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia, within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being [fol. 4] inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the eleventh day of May, in the year of our Lord one thousand nine hundred and twenty five.

George Brodbeck, Clerk of the United States District Court, Eastern District of Pennsylvania. (Seal.)

Allowed by J. W. Thompson, D. J.

[fol. 5] In United States District Court

[Title omitted]

Amended Statement of Claim—Filed February 6, 1924

Walter Peirson, the above named plaintiff, claims of the defendant, A. B. Leach & Company, Inc., a corporation, the sum of thirty-one thousand, seven hundred and fifty dollars ($31,750), with interest thereon, as hereinafter set forth, which is justly and legally due and owing by the defendant to the plaintiff, upon a cause of action, whereof the following is a statement:

1. On or about the following dates the plaintiff purchased from the defendant the following securities and paid therefor the following prices plus interest and commissions:

$20,000	Mass Oil & Refining Company, 7% Convertible Gold Bonds, purchased September 23, 1920, for	$19,000
10,000	National Oil Company, 1st Lien 7% Serial Gold Bonds, purchased February 28, 1921, for	9,800
	with which purchase plaintiff received 100 shares of the common stock of the	
[fol. 6]	National Oil Company as a bonus.	
10,000	William Whitmer & Sons, Inc., Parsons Pulp & Lumber Company, Joint and Refunding 7% Gold Bonds purchased June 19, 1920	9,800

2. In selling said securities to plaintiff, the defendant acted through its representative, Charles T. Mather, who was duly authorized to enter into contracts upon behalf of defendant relating to the purchase and sale of securities.

3. Prior to the purchase of any of the aforesaid securities, and as part of the oral agreement of purchase made at the time of purchase of each of said securities, it was orally agreed by and between the plaintiff and Charles T. Mather, acting upon behalf of the defendant, that if plaintiff purchased from the defendant said securities and at any time thereafter became dissatisfied therewith the defendant would, upon plaintiff's request, repurchase any or all of said securities at the prices paid therefor by the plaintiff at the time of purchase as aforesaid.

4. The aforesaid understanding and agreement was repeatedly affirmed by Charles T. Mather, acting upon behalf of defendant, during the period in which the said securities were purchased by the plaintiff, and all of the said securities were purchased by plaintiff at the solicitation of and upon the recommendation of Charles T. Mather, acting upon behalf of the defendant, and said purchases were made in accordance with and in reliance upon the aforesaid agreement and understanding.

5. On or about July 14, 1922, having become dissatisfied with the aforesaid securities, the plaintiff notified defendant to that effect and demanded that defend-
[fol. 7] ant should repurchase said securities, in accord-

ance with the aforesaid understanding and agreement had and entered into with Charles T. Mather upon behalf of defendant.

6. Upon said demand being made, the defendant in violation and breach of the aforesaid understanding and agreement, refused to repurchase said bonds, as requested by the plaintiff, and denied the existence of any such understanding and agreement.

7. On and about July 14, 1922, the aforesaid securities were of the following respective values:

Face value		Value
$20,000	Mass. Oil & Refining Company bonds	$5,000
10,000	National Oil Company bonds	Nominal or no value.
10,000	William Whitmer & Sons, Inc., etc., bonds	$2,500

8. Wherefore plaintiff claims the sum of thirty-one thousand, seven hundred and fifty dollars ($31,750), which represents the difference between the purchase price of the foregoing securities and their value as of July 14, 1922, together with interest on said sum from said date.

John Arthur Brown, Henry P. Brown, Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by Walter Pearson. Jurat omitted in printing.*

In United States District Court

Supplemental Affidavit of Defense and Counterclaim
Filed February 27, 1924

County of Philadelphia,
State of Pennsylvania, ss:

C. R. Miller, being duly sworn according to law, deposes and says that he is the vice president of A. B. Leach & Company, Inc.; that he is authorized to make this affidavit in its behalf; and that it has a true, just, legal and complete defense to the whole of the plaintiff's statement of claim of the following nature and character, to wit:

1. Denied. It is admitted that the plaintiff purchased from the defendant the various securities on the dates as set forth in paragraph one of the statement of claim, but it is denied that he paid therefor the prices set forth, which prices are alleged to include interest and commissions. On the contrary, it is averred that the plaintiff paid the defendant for said securities the following prices, which in [fol. 9] clude interest, but no commissions:

$20,000	Mass. Oil & Refining Company 7% Convertible Gold Bonds, purchased September 23, 1920, for	$19,915 00
10,000	National Oil Company, 1st Lien 7% Serial Gold Bonds, purchased February 28, 1921, for	10,137 78
	with which purchase the plaintiff received 100 shares of common stock of the National Oil Company as a bonus	
10,000	William Whitmer & Sons, Inc., Parsons Pulp & Lumber Company, Joint and Refunding 7% Gold Bonds purchased June 19, 1920	10,023 61
	Total purchase price	$40,076 39

2. Denied. It is admitted that Charles T. Mather was employed as a salesman of securities by the defendant, but it is denied that he had authority to consummate any sales of securities or to make any contracts for or in behalf of the defendant, or to bind it in any way whatsoever. On the contrary, it is averred that the said Charles T. Mather was only authorized to solicit orders for securities and that all orders for securities received by him were taken subject to approval and confirmation by some officer of the defendant company.

3. Denied. It is denied that prior to the giving of the orders for any of the aforesaid securities in paragraph one to the said Charles T. Mather, or at any other time whatsoever, did Charles T. Mather, acting for himself or on behalf of the defendant, agree to repurchase, at the request [fol. 10] of the plaintiff and when he should signify his dissatisfaction therewith, any securities bought by him

from the defendant at the price paid therefor by him, or for any sum whatsoever. The defendant denies that it or its agent entered into any agreement whatsoever wherein it agreed to repurchase any securities sold to the plaintiff by it, and avers that Charles T. Mather had no authority whatsoever from it to make or enter into such an agreement.

4. Denied. It is denied that the defendant through its agent, Charles T. Mather, or any other person acting in its behalf and under its instructions, ever entered into any agreement to repurchase any securities bought by the plaintiff from it, and therefore denies that any such alleged agreement was ever entered into by the defendant and or its agent or agents, or affirmed by the same, and further denies that the purchase of the said securities was made by the plaintiff pursuant to or in accordance with the terms of any such alleged agreement; and if any such agreement was made with the plaintiff it was without any authority whatsoever from the defendant.

5. Denied. It is admitted that the plaintiff on or about July 14, 1922, demanded that the defendant repurchase the securities which the plaintiff had bought from it, but it is denied that the defendant entered into an agreement at any time with the plaintiff whereby it agreed to repurchase said securities, and therefore avers that it was justified in refusing to repurchase the said securities.

6. Denied. For the reasons set forth, it is admitted that the defendant refused to repurchase the said securities, but it is denied that it refused to repurchase the said securities in violation of any agreement entered into by [fol. 11] it with the plaintiff under which it was obligated to repurchase the said securities, and it avers that there never was any such agreement entered into by it with the plaintiff whatsoever, by the terms of which it was obligated to repurchase any securities from the plaintiff.

7. Denied. It is denied that on or about the fourteenth day of July, 1922, the following securities had the value as set forth below:

Face value		Value
$20,000	Mass. Oil & Refining Company bonds	$5,000
$10,000	National Oil Company bonds	Nominal or no value
$10,000	William Whitmer & Sons, Inc., etc., bonds	2,500

But it is averred that the said securities on or above the fourteenth day of July, 1922, did have the values indicated below:

Face value		Value
$20,000	Mass. Oil & Refining Company bonds	$6,000
$10,000	National Oil Company bonds	2,900
$10,000	William Whitmer & Sons, Inc., etc., bonds	3,300
		$12,200

8. Denied. The defendant denies that the difference between the purchase price of the said securities and their respective values as of July 14, 1922, is $31,750, but on the contrary it is averred that the difference between the purchases price of the said securities and their respective values as of July 14, 1922, is $27,870.

Defendant avers that the value of said securities, so far as this action is concerned, is immaterial.

[fol. 12] The defendant denies that it is indebted to the plaintiff in the sum of $31,750, or any other sum whatsoever, but on the contrary, avers that the plaintiff is indebted to the defendant in the sum of $15,000 with legal interest thereon from January 1, 1922, as appears from the following:

Counterclaim

A. B. Leach & Company, Incorporated, a corporation, organized and existing under and by virtue of the laws of the State of New York, the defendant above named claims of the plaintiff herein, the sum of $15,000 with legal interest thereon from the first day of January, 1922, upon cause of action whereof the following is a statement:

1. On or about the eleventh day of May, 1921, the plaintiff for a valuable consideration executed and delivered to A. B. Leach & Company, Incorporated, the defendant herein, his certain promissory note in the amount of $15,

000, a copy of which is attached hereto, marked Exhibit "A," and made a part of this counterclaim. Interest upon the said note was paid by the plaintiff up to January 1, 1922, but no interest has been paid since that date.

2. The said promissory note was presented by the defendant to the plaintiff for payment, and demand for payment was made upon the said plaintiff according to the tenor of said note, but payment thereof was refused and the plaintiff still refuses to pay the principal or interest on said note, from January 1, 1922, or any part thereof.

There is justly due and owing to the defendant by the plaintiff the sum of $15,000 with legal interest thereon from January 1, 1922.

[fol. 13] Wherefore the defendant claims of the plaintiff the sum of $15,000 with legal interest thereon from January 1, 1922.

C. R. Miller.

Sworn to and subscribed before me this 13th day of November, A. D. 1923. George Thompson Fritz, Notary Public. My commission expires end of next session of Senate. (Seal.)

Exhibit "A"—Affidavit of Defense and Counterclaim

A. B. Leach & Co., Inc.

$15,000. Philadelphia, May 11, 1921.

after date, for value received, the undersigned jointly and severally promise to pay to the order of A. B. Leach & Co., Inc. (hereinafter called the Company) at ——, in Philadelphia, fifteen thousand dollars in United States gold coin or its equivalent, with interest at the rate of 7 per cent. per annum, having pledged to the Company as security for the payment of this and any other liability of the undersigned to the Company, due or to become due or which may hereafter arise, the following property: 20 M Mass. Oil Ref. 7s.

The undersigned agree to deliver to the Company additional securities to its satisfaction as it may from time to time demand, or should the market value of the securities collateral hereto suffer and decline to make satisfactory payments on account, and also hereby give to the Company a lien for the amount of all the said liabilities upon all property or securities now or hereafter in the possession of the Company in which any of the undersigned has any in- [fol. 14] terest, and also upon any balance or any deposit account with the Company. Upon nonpayment of this or any other liability, or non performance of any agreement hereunder, or in case of insolvency, bankruptcy or failure in business of the undersigned or any party hereto, this note shall forthwith become due and payable, without demand or notice, and the Company is hereby authorized to sell the said securities and property, or any substitutes thereof or additions thereto, in any proportion, at any Broker's Board or at public or private sale, at its option, without demand, advertisement or notice, and the Company may purchase the same or any part thereof, free from any right of redemption, all of which is hereby expressly waived and released. After deducting all costs or expenses of every kind for collection, sale or delivery, the Company may apply the residue of the proceeds to pay any or all of said liabilities to the Company, whether then due or to become due, returning any overplus to the undersigned, who agree to be and remain liable for any deficiency. The Company may rehypothecate any collateral security to this obligation, or it may transfer this note and deliver any or all of the said collateral securities or property to the transferee who shall thereupon become vested with all the powers and rights herein given to the Company and the Company shall thereafter be relieved and discharged from any and all liability or responsibility in connection therewith.

(Signed) Walter Pearson

To within plaintiff

You are hereby notified to file a reply to the within counterclaim within fifteen days from the service hereof otherwise judgment may be entered against you.

(Sgd.) Francis Rawle Joseph W. Henderson

[fol. 15] IN UNITED STATES DISTRICT COURT

REPLY—Filed May 18, 1925

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Walter Peirson, the above named plaintiff, being duly sworn, deposes and says that he has a just and legal defense to the whole of defendant's counterclaim of the following nature and character:

1. Admitted.

2. Payment of the principal and interest of the note referred to in defendant's counterclaim was refused because at the time of defendant's demand for such payment it owed to plaintiff the sum of $31,750, with interest, as set forth in plaintiff's statement of claim filed in this suit.

Plaintiff avers that by reason of the facts set forth in his statement of claim there is no sum justly due and owing to defendant by plaintiff, but that upon the contrary there is a balance in excess of $16,750, owing by defendant to plaintiff.

(Sgd.) Walter Peirson.

Sworn to and subscribed before me this 8th day of February, 1924. (Sgd.) Clifford K. Cassel, Notary Public. Commission expires January 16, 1927. (Seal.)

[fol. 16] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed May 1, 1925

CAPTION

Be it remembered, that in the said term of December, 1922, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid before the Honorable J. Whitaker Thompson, Judge of the said court, the seventeenth day of February, 1925, the aforesaid issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (prout list of jurors), at which day came as well the said plaintiff as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and the said defendant offered evidence as particularly set forth in the following stenographic notes of testimony, and the evidence in the cause being closed, the learned trial judge charged the jury and affirmed and refused to affirm points presented on behalf of the plaintiff and on behalf of the defendant, as hereinafter set forth and as follows:

[fol. 17] [Title omitted]

Jury sworn February 17, 1925.
Mr. Brown opened to the jury on behalf of plaintiff.
Mr. Henderson opened to the jury on behalf of defendant.
(Adjourned to February 18, 1925.)

February 18, 1925.

Trial resumed.
Present as before noted.

PLAINTIFF'S EVIDENCE.

WILLIAM PEARSON, sworn and examined as follows:

Direct examination.

By Mr. Brown:

Q. Where do you live?
A. Radnor.
Q. What is your business?
[fol. 18] A. Morocco manufacturer.
Q. Where is your place of business?

A. Thirty-sixth and Reed Streets, Philadelphia.

Q. What is the firm with which you are connected?

A. Mitchell & Peirson.

Q. How long have you been engaged in that business?

A. Thirty-seven years.

Q. Do you know A. B. Leach & Company?

A. Yes, sir.

Q. Do you know a Mr. Mather?

A. Charles T. Mather, yes, sir.

Q. Who is he?

A. He was a representative of A. B. Leach & Company.

Q. Tell us, if you will, the first interview or association you had with Mr. Mather representing A. B. Leach & Company in this case?

Mr. Henderson: At this point I wish to reserve the right to request the testimony of Mr. Peirson be stricken from the record unless Mr. Brown follows it by subsequent testimony showing that Mr. Mather had authority from A. B. Leach & Company to enter into any contract with Mr. Peirson.

By Mr. Brown:

Q. Have you the question in mind?

A. Yes, sir.

Q. Will you answer it, please?

A. Mr. Mather was known pretty well to my son, Walter Peirson, Jr.

Q. Who is sitting here?

A. Yes, sir, and he had visited him quite a number of times at our place of business.

Q. Is your son associated with you in business?

(fol. 19) A. Yes.

Q. What happened?

A. And Mr. Mather had sold my son some securities at various times, different amounts, and my son had mentioned Mr. Mather to me. He said Mr. Mather wanted to meet me.

Mr. Henderson: I object to what he said.

(Objection sustained.)

The Witness: Mr. Mather was brought in to me by my son and introduced to me by my son.

By Mr. Brown:

Q. Do you remember when that was?
A. That was——

By Mr. Henderson:

Q. What is the document you are looking at?
A. That is a memorandum of the transactions I have had with A. B. Leach & Company taken from my books. The first transaction was June 19th, 1920. It was sometime just prior to that.
Q. Sometime just prior to June 19th, 1920?
A. Yes, sir.

By Mr. Brown:

Q. What happened when your son brought Mr. Mather into your office?
A. He introduced Mr. Mather to me and Mr. Mather's object was——
Q. You cannot tell us what Mr. Mather's object was, but what did Mr. Mather say to you at that time?
A. He spoke of the William Whitmer & Sons, Parsons Pulp & Lumber Co. Joint Refunding 7 Per Cent. Bonds.
Q. Did he say to you at that time whom he represented?
A. He did.
Q. What did he say?

[fol. 26] Mr. Henderson: Objected to. My objection is this: If Mr. Mather stated he had authority to bind A. B. Leach & Company that is not evidence.

(Objection sustained.)

Mr. Brown: I offer to show the circumstances under which these bonds were purchased. While it is true that the declarations of the agent are not admissible to prove his authority, they are admissible as part of the circumstances under which the sale was made, as part of the inducement under which Mr. Person bought these bonds. In that connection I submit to your Honor a case in 211 Pennsylvania 534, Singer Manufacturing Company v. Christian.

The Court: I hardly think that case sustains your position because you have not proved the agency.

Mr. Brown: I expect to prove Mr. Mather saw Mr. Peirson, that he stated that he was the representative of Leach & Company, and that Leach & Company were bringing out these securities. That he induced Mr. Peirson to purchase these securities that I have mentioned, with the understanding that the Leach Company stood back of these securities and that if at any time Mr. Peirson desired they would take them off his hands at the price he paid for them. That was the inducement that led Mr. Peirson to purchase, and the representation was made by the agent.

I will go further and say that shortly after that time, within a period of a few months, Mr. Peirson addressed a letter to Leach & Company in which he referred to this arrangement under which he had purchased these securities, in the case of the Massachusetts 6% bonds. I will prove that letter was delivered to Leach & Company and it was never denied that this arrangement was made at that time [fol. 21] I will also prove that the second letter, embodying the same demand or the same statement was delivered to Leach & Company in which he called on them to live up to their contract, and Leach & Company never denied this arrangement had been made. I appreciate the difficulties in my case, but it does seem to me under the circumstances where we bring home knowledge of the representation made by the agent to the principal and that is not denied by the principal, that connected with the representation offers sufficient evidence on which the jury could infer the authority of the agent to make the representation.

The Court: It is not admissible unless your offer of proof covers sufficient to make it admissible. The law is as it is stated in that case, there must be independent proof of the agency before the declaration of the agent is admissible. There must be found sufficient to prove an authority back of the declaration.

Mr. Brown: As a question of practical proof how can I otherwise proceed than I am doing.

The Court: Well, I do not know. You offer this evidence without any evidence to follow.

Mr. Brown: Might I suggest that this evidence is admissible as the only manner in which I can establish my case, and if when my case is in I have not presented sufficient facts to show either ratification or an implied authority

to bind under these circumstances, then the defendant is fully protected under your Honor's ruling that I have not established my case, but I have to proceed in some way at this time, and I offer to prove these facts which I have indicated to establish the authority and the binding force of this arrangement on Leach & Company.

[fol. 22] The Court: I will overrule the objection, in view of the offer of proof, and pass on the sufficiency of the evidence, after the evidence is in.

By Mr. Brown:

Q. What did Mr. Mather say to you and what did you say to him at this first interview?

A. Mr. Mather talked of the William Whitmer Parsons bonds.

Q. Did he tell you who he represented?

A. He said he was connected with A. B. Leach & Company and they were a very large, responsible house, stood very high, very good standing, and he was proud to be associated with them, and so on, and then offered me the William Whitmer Parsons bonds.

Mr. Henderson: I understand my reservation goes to this entire testimony after it is in, and all our rights are reserved as to its admissibility.

By Mr. Brown:

Q. What did you state to Mr. Mather in response to that?

A. Among other things Mr. Mather spoke of the high quality of the bonds, that they were a good investment, and he said, "You cannot lose on them. Any time you wish A. B. Leach & Company will take them back off your hands at the price you paid for them."

Q. What else did he say that you recall at that time?

A. Well, he talked. Of course a bond salesman talks considerable but that is the substance of what he said.

Q. What was that date as near as you can fix it?

A. Some time prior to June 19, 1920.

Q. What did you do after that interview with your son and Mr. Mather?

[fol. 23] A. I told Mr. Mather I would think it over for a day or two and I did.

Q. Then what did you do?

A. I thought so well of the bonds that I told my son, who was a friend of Mr. Mather's, that he could tell Mr. Mather I would take 10,000 of those bonds, and I did. Do you want the date?

Q. When did you pay for those bonds and how much did you pay?

A. As it stands on my books, June 19th, 1920.

Q. How much did you pay for the bonds?

A. Ninety eight; $9,800, and interest $223.61, total $10,023.61.

By Mr. Henderson:

Q. Of course, you got your interest back?

Mr. Brown: I object. Counsel will have an opportunity to cross examine.

I offer in evidence check dated June 25, 1920.

(Marked "Plaintiff's Exhibit No. 1," copy as follows:)

PLAINTIFF'S EXHIBIT No. 1

"Walter Pierson

Philadelphia, June 25, 1920. No. 113.

Pay to the order of A. B. Leach & Co. Inc. Ten Thousand and twenty three 61 100 Dollars. Payable Through the Philadelphia Clearing House

(Signed) Walter Pierson.

To The Land Title & Trust Co. (3-69.) $10,023 61 100 ℔
Philadelphia.

(Stamped on back:) Pay to the order of Girard National Bank. A. B. Leach & Company, Inc. Received Payment, The Girard National Bank, Jan. 23, 1920. Received Payment through the Clearing House, June 28, 1920. Girard National Bank."

[fol. 24] Q. Did you receive a letter from A. B. Leach & Company or Mr. Mather?

A. I did.

Q. Is this the letter?

A. Yes. That is before the transaction. That is after having received the order.

Q. After you gave the verbal order, but before you *paid* for the bonds?

A. Yes.

Q. You received this letter?

A. Yes, sir.

Mr. Brown: I offer in evidence letter on the letterhead of A. B. Leach & Company, Inc., dated May 25, 1920, as follows:

OFFER IN EVIDENCE

"Mr. Walter Pierson, 30th & Reed Streets, Philadelphia, Penna.

My Dear Mr. Pierson: I write to express my thanks and appreciation for the nice bond order Walter gave me today for your account.

It is certainly very kind of you to allow me to do this business with you, and I sincerely hope it will prove very satisfactory and profitable.

Once again expressing my thanks and appreciation,

I remain, Yours sincerely,

Chas. T. Mather."

Q. What happened after that?

A. Some time later Mr. Mather came in to see me again, and this time he offered Massachusetts Oil and Refining Company gold bonds.

Q. Did you receive this letter from A. B. Leach & Company, dated June 23, 1920?

A. Yes, sir.

Mr. Brown: I offer in evidence letter on the letterhead [fol 25] of A. B. Leach & Company, Inc., 115 South Fourth Street, Philadelphia, dated June 23, 1920:

"PLAINTIFF'S EXHIBIT NO. 4"

"Mr. Walter Pierson, 30th & Reed Streets, Philadelphia, Pa.

Dear Sir: Enclosed please find memorandum showing amount due on your purchase of $10,000 Whitmer Parsons 7's, 1925, on Saturday, June 26th.

We will mail you these bonds Thursday, so that they will reach you Friday, and we understand that you will send check for this amount Friday so as to reach us Saturday. Very truly yours, A. B. Leach & Co., Inc. McKeag, Cashier."

Q. What happened after that?

A. Some time later Mr. Mather came to see me again. He may have drifted in several times in the meantime. He got the habit of coming to see me, and some time prior to September 23, 1920, he offered me Massachusetts Oil and Refining Company gold bonds.

Q. Where did he see you?

A. In my office.

Q. Where is your office?

A. Thirty sixth and Reed Streets, Mitchell & Peirson.

Q. What did he say to you at that time and what did you say to him?

A. Just as he did before.

Q. What was it?

A. That these Massachusetts Oil & Refining Company [fol. 26] bonds were high class bonds, that they were going to guarantee them, and I would make money on them and get a big return in interest on them, and he said as he did in the previous case, "You can not lose on them. Any time you wish A. B. Leach & Company will take them off your hands at the price you paid."

Q. Did he tell you who was bringing out these bonds?

A. A. B. Leach & Company.

Q. Referring to your previous transaction on the William Whitmer bonds, did he tell you who was bringing them out?

A. A. B. Leach & Company.

Q. What did you do after that with respect to the Massachusetts Oil & Refining bonds?

A. Ordered 10,000.

Q. Do you remember when that was?

A. I only have the dates on my book. Some time prior to September 23, 1920. Then a little later, probably the next day, I ordered 10,000 more, making a total of 20,000.

Q. Did you receive this letter dated September 14, 1920?

A. Yes, sir.

Mr. Brown: I offer in evidence letter on letterhead of A. B. Leach & Company, Inc., Philadelphia, September 14 1920.

"PLAINTIFF'S EXHIBIT No. 5"

"Mr. Walter Peirson, 36th & Reed Street, Philadelphia, Pa.

Dear Sir:- We take pleasure in confirming our Mr. [fol. 27] Mather's offering of Massachusetts Oil Refining Company 1st Mtge. 7% Participating Gold Bonds at 98 and accrued interest.

These bonds are a direct obligation of the company which has about completed a modern refining plant with an initial capacity of 1,500,000 barrels of crude oil per annum, located in Boston Harbor on property comprising about 76 acres. The company has a very favorable contract with the Island Oil & Transport Corporation to supply it with crude oil to its capacity. Island Oil is now one of the principal producing companies of light Mexican petroleum and has every facility for shipping its products to the Massachussetts Refining Company.

These bonds, in addition to carrying a fixed rate of 7%, will participate up to 20% in the net profits of the company. There is on each bond a July 1st coupon calling for $35 semi annual interest and another coupon of the same date which will be used to collect the 20% of the profits allotted to the bondholders each year. It is estimated that this participating feature will net the holder a very handsome sum, possibly running up to $50 to $120 in addition to the fixed rate of $70 per annum.

As an indication of how the bonds are regarded in the immediate vicinity in which the Refinery is being erected, we might state that the First National Bank of Boston has purchased several hundred thousand of these bonds and a very large Trust Company of Boston has purchased nearly as many.

Another very favorable feature of this bond is the privilege of converting it into the same par value of 7% Cumulative and Participating Preferred Stock. This Preferred Stock is entitled to the same 20% participation in the net earnings as the bonds and is callable as a whole at 125%

instead of 120, the call price of the bonds. This company is incorporated under the laws of Massachusetts and it is [fol. 28] our information that such stock will be considered a very choice investment.

A very liberal Sinking Fund of 10% of the net profits after taxes, depreciation and bond interest, will result in the liquidation of this issue very rapidly. The bonds are callable at 120 and accrued interest.

Several units of this plant have been completed and the first shipment of oil, a cargo of 65,000 barrels, has arrived and is being put through the Topping Stills with better results even than the Management anticipated. Other units of this Refinery are soon to be finished and in full operation and a large earning capacity is absolutely assured.

We feel confident that the return of these bonds will be most attractive and we unqualifiedly recommend your taking a substantial amount of them either for immediate or delayed delivery, to suit your convenience.

Yours very truly, A. B. Leach & Co., Inc."

Q. And did you also receive from A. B. Leach & Company this letter dated September 20th, 1920?

A. Yes, sir.

Mr. Brown: I offer in evidence letter on letterhead of A. B. Leach & Company, dated September 20, 1920.

"Plaintiff's Exhibit No. 6"

"Mr. Walter Peirson, 30th & Reed Sts., Philadelphia, Pa.

Dear Sir: We take pleasure in confirming sale to you through our Mr. Mather of $10,000 Massachusetts Oil Refining Company First Mortgage 7% Participating Gold Bonds at 98 *at* accrued interest.

[fol. 29] Should you decide to purchase $10,000 additional, please advise us as quickly as possible, as we think our balance on hand will be disposed of in a few days.

Thanking you for this business on behalf of our Mr. Mather and ourselves, we are

Yours very truly, A. B. Leach & Co., Inc."

Mr. Brown: I also offer in evidence letter dated September 21, 1920, on the letterhead of A. B. Leach & Company.

"Plaintiff's Exhibit No. 7"

"(Letterhead A. B. Leach & Co., Inc.)

Philadelphia, September 21, 1920.

Mr. Walter Peirson, 36th & Reed Sts., Philadelphia, Pa.

Dear Sir: We beg to confirm sale to you today through our Mr. Mather of $10,000 additional Massachusetts Oil Refining Corporation first mortgage 7% participating gold bonds at 98 and accrued interest.

We agree to accept Liberty Bonds in payment at 1% above the market.

Agreeable with your request, Mr. Mather will meet you at the Girard Trust Company tomorrow, Wednesday, 22nd, at 1:30 P. M.

We understand that you desire us to retain the temporary bonds until the definite bonds are ready for delivery.

Assuring you of our appreciation of your favors, with kind regards, we are

Yours very truly, A. B. Leach & Co., Inc.

CRM MK."

[fol. 30] Q. What about the exchange of these Liberty bonds?

A. Why, I gave them 21,000 United States Victory three and three-quarter bonds. They allowed me $96.56 on them, and said that was one point above the market. I bought the Massachusetts Oil and Refining Company bonds at 98. Now, when the thing was all figured out, interest both ways, there was due me $574.79 for which they sent me their check.

Q. You received these two letters dated September 23, 1920, and January 12th, 1921, from A. B. Leach & Company?

A. Yes, sir.

Mr. Brown: I offer in evidence letter dated September 23, 1920, on the letterhead of A. B. Leach & Company, Inc.

"Plaintiff's Exhibit No. 8"

Mr. Walter Peirson, 36th & Reed Sts., Philadelphia, Pa.

Dear Sir: We beg to acknowledge receipt from you, through our Mr. Mather, $21,000 U. S. Victory 3¾'s for which he gave you receipt yesterday.

We take pleasure in enclosing statement and check for $574.79, balance due you.

Assuring you of our appreciation of your favors, with kindest regards, we remain,

Very truly yours, A. B. Leach & Co., Inc."

I also offer in evidence letter dated January 12, 1921, on the letterhead of A. B. Leach & Company.

"Plaintiff's Exhibit No. 9"

[fol. 31] "Mr. Walter Peirson, Sr., 36th & Reed Streets, Philadelphia, Pa.

Dear Sir: Our Mr. Mather deposited for your account today, at the Land Title & Trust Company, 20 coupons from Massachusetts Oil Refining bonds aggregating $700.

We are holding the bonds here pending your advices, when you will find it convenient for Mr. Mather to meet you at the Girard Trust Company to put these bonds away for safe keeping.

Yours very truly, A. B. Leach & Co.,Inc."

Q. You met Mr. Mather at the Girard Trust Company?

A. Yes, sir

Q. What did you do there?

A. You mean the time that he received from me the 21,000 Victory bonds? I gave them to him.

Q. Did you see Mr. Mather after that time?

A. Yes.

Q. When?

A. I saw him sometime prior to February 28, 1921.

Q. Where did you see him?

A. In my office.

Q. What did he say to you and what did you say to him?

A. Why, he was offering some other bonds, the National Oil Company's first lien, 7 per cent gold bonds.

Q. What did you say to him and what did he say to you?

A. He spoke of these bonds as being a first class investment.

Q. Did he tell you who was bringing them out?

A. A. B. Leach & Company.

[fol. 32] Q. What did he say to you with respect to their position on these bonds?

A. The same as the other, you cannot lose on them. A. B. Leach & Company, at any time you wish, will take them off your hands at the price paid for them, and he didn't say that once or twice but during these visits more than half a dozen times.

Q. Did you or did you not rely on these statements that he made?

A. I certainly did.

Q. Were they or were they not the inducements under which you purchased these bonds?

A. They were the prime inducement.

Q. I show you letter dated February 26, 1921, and also a letter dated March 24, 1921, and I ask you if you received these letters from A. B. Leach & Company.

A. Yes, sir.

Mr. Brown: I offer in evidence letter dated February 26, 1921, on the letterhead of A. B. Leach & Company.

(Marked "Plaintiff's Exhibit No. 10." Copy as follows:)

"Mr. Walter Peirson, Sr., 36th & Reed Streets, Philadelphia, Pa.

Dear Sir: We are pleased to confirm sale to you through our Mr. Mather of $10,000 National Oil Company 1st Lien 7's, May 1, 1924, at 98½, and accrued interest with 100 shares Common Stock Bonus, for delivery to suit your convenience.

We assume you will advise Mr. Mather or ourselves, when to deliver the bonds and proceed with the registration of the stock.

[fol. 33] Assuring you of our appreciation of this business on behalf of our representative and ourselves, we remain

Yours very truly, A. B. Leach & Co., Inc."

I also offer in evidence letter dated March 24, 1921, on letterhead of A. B. Leach & Company, Incorporated.

"PLAINTIFF'S EXHIBIT No. 11"

"Mr. Walter Peirson, Sr., 36th & Reed Streets, Philadelphia, Pa.

DEAR SIR: In compliance with request of our Mr. Mather we enclose herewith memorandum of your purchase of $10,000 National Oil 7s, 1924, with interest figured as of March 29th, 1921.

Very truly yours, A. B. Leach & Co., Inc. McKeag, Cashier."

Q. What happened after that?

A. Sometime later, prior to May 9th, 1921, I was associated with Mr. Edward D. C. Lynch in a matter which required some money and I wished to make a loan. I gave to Mr. Lynch some various securities to take to a trust company to make a loan, among them the $20,000 Massachusetts Oil and Refining bonds, and Mr. Lynch came back and said

Mr. Henderson: I object to any further testimony as to what Mr. Lynch said.

(Objection sustained.)

[fol. 34] By Mr. Brown:

Q. As a result of what Mr. Lynch told you what did you do?

A. The Massachusetts Oil & Refining Company bonds were declined by the trust company as good collateral.

By Mr. Henderson:

Q. Do you know that of your own knowledge?

A. Yes.

Q. You were there?

A. I was not.

Q. Now, how do you know of it of your own knowledge?

A. Mr. Lynch told me.

Mr. Henderson. I ask that the answer be stricken from the record.

(Motion allowed.)

By Mr. Brown:

Q. As a result of the information conveyed to you by Mr. Lynch, what did you do?

A. I wrote to A. B. Leach & Company a letter.

Q. Under what date?

A. May 9th, 1921.

Mr. Brown: I call on the defendant to produce a letter dated May 9th, 1921, addressed to them and signed by Walter Peirson.

Mr. Henderson: The defendant answers that it has not and is not able to produce the letter as it never received it.

By Mr. Brown:

Q. Mr. Peirson, have you your letter book?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir.

Q. What is the book that you produce?

[fol. 35] A. This is my letter copy book.

Q. Where do you keep that book?

A. In my office.

Q. In what part of your office?

A. There is a chest of drawers like and I keep it in one of those drawers.

Q. In your desk?

A. No, not in my desk.

Q. Is this book in the same room as your office?

A. Yes, sir.

Q. What does the book contain?

A. Copies of letters which I personally write.

Q. What do you mean which you personally write?

A. Why, I sit down and pick them off on the typewriter.

Q. You write them, I suppose, with one or two fingers?

A. Only one.

Q. Now, I understand that you write these letters. That is correct, is it?

A. Almost always. Once in a while I dictate one of my letters but almost always I write them myself.

Q. Do you remember writing that letter of May 9th, 1921?

A. I do.

Q. On your typewriter?
A. Yes, sir.
Q. What did you do with that letter?
A. I addressed an envelope to A. B. Leach & Company
Q. On your typewriter?
A. On the typewriter.
Q. And then what did you do?
A. I took the letter out.
Q. Did you sign the letter?
A. I signed it. I took the letter and the addressed envelope and the copy book out into the main office and asked the young man there to copy it and mail it.
[fol. 36] Q. Joseph Stinger, you mean?
A. Yes.
Q. Is he here in court?
A. Yes, sir.

Mr. Brown: With your Honor's permission I would like to withdraw Mr. Peirson a moment and put Mr. Stinger on the stand.
The Court: You may do that.

Joseph H. Stinger, sworn and examined as follows:

Direct examination.

By Mr. Brown:

Q. Where do you live?
A. 1227 South Ruby Street, West Philadelphia.
Q. Where are you employed?
A. Mitchell and Peirson.
Q. How long have you been employed there?
A. Five years and eight months.
Q. What are your duties?
A. General office work.
Q. Do you work for Mr. Peirson who has just been on the stand?
A. I work for Mr. Peirson.
Q. What is this book that I have here before me which Mr. Peirson has produced?
A. Mr. Peirson's personal letter copy book.

Q. Who writes most of these letters?
A. Mr. Peirson himself.
Q. Where does he write them?
A. In his own office.
Q. I won't ask you whether he does it with one finger or five fingers, but he does write most of them?
A. I believe so.

[fol. 37] By Mr. Henderson:

Q. Do you know?
A. To the best of my knowledge and belief he does.

By Mr. Brown:

Q. Do you remember Mr. Peirson on or about May 9th, 1921, bringing you out this letter book with a letter which he had written addressed to A. B. Leach & Company, dated May 9th, 1921, and an envelope which he had addressed and giving you the letter book and the letter and the envelope and asked you to copy the letter and mail it?

Mr. Henderson: I object to the form of the question.

(Question withdrawn.)

By Mr. Brown:

Q. What did Mr. Peirson do in connection with this letter of May 9th, 1921?

The Court: You may show him the letter and ask him whether or not he ever saw the original of the letter.

By Mr. Brown:

Q. Did you ever seen the original of that letter?
A. Yes, sir.
Q. Where did you see it?
A. I remember Mr. Peirson bringing a letter and the addressed envelope out to me to copy.
Q. What did you do?
A. I copied it in the book and then mailed it.
Q. Copied it in this book?
A. Yes, sir.
Q. At what place?

A. Mr. Peirson's place.

Q. I mean at what place in the book? Can you refer to [fol. 38] the book and tell me where you copied it, the page?

A. No, I don't know what page.

Q. And what did you do with the letter after you copied it?

A. Mailed it.

Q. How was the envelope addressed?

A. A. B. Leach & Company.

Q. Where was the address, do you remember?

A. South Fourth Street.

Mr. Henderson: At this stage, I feel any introduction of this letter is entirely improper. I do not wish to be technical but this letter is entirely out of the book, and I think Mr. Peirson ought to state why it was cut out of the book.

Mr. Brown: He will. I will recall Mr. Peirson.

Mr. Henderson: Well, this is the witness who says he copied it in the book, and I think it is up to him to explain whether or not that sheet was in the book at the time he copied it.

By Mr. Brown:

Q. Was the sheet which I show you, this letter which I show you, dated May 9th, 1921, at page 64 appearing on the right hand lower part, in the book when you copied it?

Mr. Henderson: Objected to. If he can answer whether it was or was not in the book I have no objection if it is then properly explained why it was taken out.

By Mr. Brown:

Q. Was that letter in the book when you copied it on that page?

A. To the best of my knowledge and belief it was.

[fol. 39] By Mr. Henderson:

Q. How long have you been in the employ of Mr. Peirson?

A. Five years and eight months.

Q. At the time that this letter was written on the 9th of May, 1921, is that correct?

A. I believe so, yes.

Q. You believe it was?

A. Well, in May, 1921.

Q. As a matter of fact you don't know whether you ever saw that letter or not, do you?

A. Well, to the best of my knowledge and belief, I did.

Q. Well, I want your knowledge. Do you recollect that particular letter of May 9th, 1921?

A. To the best of my knowledge and belief I do recall it.

By the Court:

Q. Why do you always say to the best of your knowledge and belief? You are testifying here to a fact. Now, do you know it or don't you? That is what the jury wants to know.

A. Yes, I do.

Q. How do you happen to recall that?

A. This case pending I wanted to refresh my memory and consulted the record.

By Mr. Henderson:

Q. When did you consult the record?

A. Well, not so long ago.

Q. In preparation for this case?

A. No, sir. I wanted to refresh my memory.

Q. Now, how do you know that that particular page came out of the book instead of a dozen other pages just like it?

A. That is beyond me.

[fol. 40] Q. That is beyond you and you don't know, do you?

A. I don't know how it got out of there, no.

Q. I am not asking you that, but I want to know why it is you know that that sheet of paper was in that book?

A. Well, it was.

Q. Now, how do you know that?

A. Well, naturally it fits there with the book.

Q. I don't want any naturally about it, but how do you know it?

A. Well, it is a direct copy and the sheet fits perfectly correct.

Q. Did you try to fit it?

A. No, sir.

Q. Then, how do you know that it fits perfectly?

A. I noticed it being compared here.

Q. By whom?

A. By your Honor.

Q. He tried to fit it?

A. I suppose that is what he was doing.

Q. As a matter of fact you state this as a perfect fit. Do you notice how this is torn at the top?

A. Yes, sir.

Q. And you say that the reason you knew that this letter was in the book was because it fit, is that it?

A. Yes, sir.

Q. And that is your only reason?

A. Yes, sir.

Q. What day of the week was that May the 9th?

A. I don't recall.

Q. What time of the day was it that Mr. Peirson brought you this letter?

A. I don't recall.

Q. Did you remember the envelope?

A. Why, yes, I do.

Q. What name did it have on it?

[fol. 41] A. A. B. Leach & Company.

Q. A. B. Leach & Company and that was all?

A. Of course, the address in Philadelphia.

Q. Do you recall the address?

A. Philadelphia, South Fourth Street. I don't know the number.

Q. Philadelphia?

A. Yes.

Q. How do you happen to recall that?

A. I happen to know that Leach & Company was on South Fourth Street.

Q. So therefore a letter addressed to Leach & Company would be sent to South Fourth Street, is that your reason?

A. Yes, sir.

Q. How about the stamp on this envelope, did you put it on?

A. No, sir.

Q. Who did?

A. It was a stamped envelope, already stamped.

Q. It was an already stamped envelope?

A. Yes, sir.

Q. How do you remember that?

A. That is the only kind we use in our office.

Q. So, then, your only reason for knowing it was a stamped envelope is because that is the only kind you got in your office?

A. Yes, sir.

Q. Never had any other kind out there?

A. Not that I recall.

Q. You don't know whether you ever had anything except stamped envelopes in that office?

A. No, I do not.

Q. How long were you there?

A. Five years and eight months.

Q. Were you there on June 13th, 1922?

A. Yes, sir.

[fol. 42] Q. Were they still using addressed envelopes or stamped envelopes at that time?

A. Yes, sir.

Q. You state that during your whole time out there at Mitchell & Peirson's, the only envelopes they used were envelopes that have stamps on them. I show you an envelope bearing date June 13, 1922, and ask you if that is a stamped envelope?

A. The stamp has been put on that envelope.

Q. So that they did have envelopes which were not already stamped?

A. Well, according to that, they did. Not to my knowledge.

Q. No question about it, is there?

A. No.

Q. That is Mitchell & Peirson's envelope, is it?

A. Yes, sir.

Q. The same type of envelope you used?

A. Why, no.

Q. Except a smaller size?

A. No, this is a yellow envelope and the stamped envelopes are white.

Q. That is the only kind the Government stamps, isn't it?

A. I couldn't tell you that.

Q. You are still sure this envelope was mailed out in a white envelope?

A. Are you referring to May, 1921?

Q. May 9th, 1921.

A. Yes.

Q. Why?

A. Well, it was a stamped envelope and that is the only kind we have.

Q. But you still had some of these, too, didn't you?

A. Well, that is an envelope that is not usually used.

[fol. 43] Q. You had some of them just the same, didn't you?

A. Not to my knowledge.

Q. When did such envelopes come to your knowledge? Is this the first occasion?

A. No.

Q. Have you ever seen them before?

A. Yes, sir.

Q. That is just about a year after the other one, isn't it? You didn't put in any order for new stationery at that time, did you?

A. That is beyond me. I couldn't tell you that.

Q. Now, come back to the letter again. Where is your office?

A. I have no office. I work at Thirty-sixth and Reed, in the main office, Mitchell & Peirson.

Q. Your job is to copy Mr. Peirson's letters in that book, isn't it?

A. Practically all of them.

Q. This book is pretty nearly filled with letters. Did you copy all of them?

A. I couldn't say all, but practically all.

Q. Mr. Peirson brings his book out with a letter and then you copy the letter?

A. Yes.

Q. So you think therefore that he brought this letter out to you and you copied it?

A. I did, yes.

Q. Now, when was it?

A. May, 1921.

Q. Now, how do you recall it was May 9, 1921. Is it because the letter has that date on it?

A. Because the pending trial naturally I would want to refresh my memory as to the date.

Q. How do you refresh your memory?

A. The date on the letter shows it was mailed.

[fol. 44] Q. The date on the letter is what recalls it to your memory. Is that correct?

A. Yes.

Q. That is the only thing that recalls it to you?

A. Yes, sir.

Q. You don't recall anything at all about how the letter was brought to you?

A. Well, Mr. Peirson always brings the letter and the envelope to me.

Q. This particular letter I am talking about and nothing else.

A. He brings the letter and the envelope to me and I copy the letter.

Q. Where did he bring this letter to you?

A. In the main office.

Q. What part of the main office?

A. Well, that is pretty hard to explain. They have a copying machine that sits right near the table.

Q. It is very important, this letter, and I want to know about it. Now, you say he brought this letter to you?

A. Yes.

Q. No doubt about it, dated May 9th, 1921?

A. Yes, sir.

Q. Now, what time did he bring it to you?

A. I don't know about the time.

Q. Why not?

A. I couldn't remember that far back.

Q. Was it in the morning or the afternoon?

A. I don't recall.

Q. Where did he bring it to you on that day?

A. Brought it to me in the main office.

Q. Mr. Peirson is in the habit of coming out to you in the main office with his book, he being the head of the firm, and giving it to you and you copy these letters for him?

A. That is correct.

[fol. 45] Q. Now, you remember this letter of May 9th, do you?

A. Yes, sir.

Q. 1921?
A. Yes, sir.
Q. And you remember specifically his bringing it out to you?
A. Yes, sir.
Q. Do you remember his leaving a letter out there on the 7th of May, 1921, to Mr. Lynch?
A. No, I don't recall that.
Q. Do you remember his bringing you out a letter of May 11th to the First National Bank of Boston?
A. I don't recall.
Q. What other letters did he bring to you on the 9th of May, 1921?
A. I don't recall.
Q. You don't recall any other letters?
A. I don't recall such things so far back.
Q. What letters did he bring on the eighth?
A. I don't recall.
Q. What letters did he bring on the 10th of May?
A. I don't recall.
Q. What other letters did he bring to you on the 9th of May, 1921
A. I don't recall.

Walter Peirson recalled.

Direct examination.

By Mr. Brown:

Q. Who took this letter out of this book?
A. I did.
Q. When did you do it and why?
A. Why, we were preparing our case and you wanted [fol. 46] me to come up and see you with what evidence I had.
Q. What did you do?
A. Instead of taking the book I cut out that letter and one other letter.
Q. You, yourself, cut it out?
A. Yes, sir.
Q. What did you cut it out with?
A. A pair of scissors, big scissors.

Q. Did you cut any other letter out?
A. Just those two.
Q. What other letter did you cut out?
A. April 21st, 1922.
Q. Is that a copy of the other letter you cut out?
A. Yes, that is it.
Q. Will you show me in the book?

Mr. Henderson: Objected to. I object to any testimony as to his cutting out any other letter.

The Court: I don't see what any other letters have to do with it.

Mr. Brown: I offer in evidence letter of May 9th, 1921, as represented by this copy.

Mr. Henderson: Objected to.

The Court: Well, that is a question for the jury. The credibility of the witnesses is for the jury.

Mr. Henderson: There has been no testimony that this particular letter was mailed. Mr. Stinger did not say so on the stand.

The Court: As I recall it he did say he mailed the letter.

Mr. Henderson: I further object to this letter as a self serving document, and I ask that it be handed to your Honor to pass upon.

The Court: Of course it is a self serving document but it may become something else if it is received by the defendant.

[fol. 47] (Objection overruled. Exception noted for defendant by direction of the Court.)

Mr. Brown: I now offer in evidence letter of May 9th, 1921, as represented by this letter book copy.

"Plaintiff's Exhibit No. 12"

"Messrs. A. B. Leach & Co., 115 South 4th St., Philadelphia.

Dear Sirs: When I purchased from you the Mass Oil & Ref Co Bonds it was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98.

I have need of some money and will avail myself of this privilege.

When shall I deliver them to you.

Very truly yours, Walter Peirson."

Mr Brown: I also offer in evidence the letter press copy book with particular reference to the page where this copy has been cut out.

(Letter book page 63 marked "Plaintiff's Exhibit No. 13" and page 65 marked "Plaintiff's Exhibit 14.")

By Mr. Brown:

Q. What happened after you wrote that letter?
A. Mr. Mather called on the 'phone.
Q. Where were you at that time?
A. In my office.
Q. Do you remember the day that he called you?
A. It was right following.
Q. The day following?
A. Yes.

[fol. 48] Q. What did you say to him and what did he say to you?

A. I told him that Massachusetts Oil & Refining Company bonds were not good collateral, that the trust officer had declined to take them as collateral and he said pooh, pooh, that is all nonsense, they are as good as wheat. He says, "We will loan you money on them."

Q. Did you tell him what you wanted to do with the bonds?

A. I did tell him I was offering them with other securities for a loan.

Q. Did you tell him how much the loan was?

A. No.

Q. Did you tell him how much you tried to borrow on these bonds?

A. No, sir. They were in a bunch with other securities.

Q. What did he say?

A. Pooh, pooh, that trust officer doesn't know what he is talking about. Those bonds are as good as wheat. We will loan you money on the bonds.

Q. What did you say to him?

A. Well, not much. It was arranged they would loan me $15,000.

Q. On a par value of $20,000 worth of bonds?

A. Yes, sir.

Q. And what did you do after that?

A. I told Mr. Lynch to take the bonds back.

Mr. Henderson: Objected to.

The Witness: Well, the bonds were delivered to A. B. Leach & Company. Now, can I say by whom?

By Mr. Brown:

Q. I will ask you by whom were the bonds delivered to A. B. Leach & Company?

A. Mr. Lynch.

[fol. 49] Q. Where did he get the bonds?

A. He had them.

Q. You gave them to him?

A. Along with these other securities to make a loan on them.

Q. Who is Mr. Lynch?

A. He is here. He is an investment man in Philadelphia.

Q. Did you hear from Mr. Lynch after you gave these bonds to him?

A. Yes.

Q. What did you receive from Mr. Lynch?

A. I have a letter here from Mr. Lynch.

Q. And what did you receive from Mr. Lynch in addition to that letter?

A. This letter explains.

Q. You received a letter dated May 11th, 1921, from Mr. Lynch?

A. Yes, sir.

Mr. Henderson: That is objected to and I ask that it be stricken out. They haven't tied up A. B. Leach & Company at all.

The Court: He merely received a letter. The letter is not offered in evidence yet.

By Mr. Brown:

Q. What else did you receive from Mr. Lynch besides the letter?

A. Note.

Q. A note of what?

A. A. B. Leach & Company, $15,000.

Q. What else?

A. Mr. Lynch got a check from them and deposited it in bank to my credit.

Q. And what did you do with the note?
A. Signed it and returned it to them.

Mr. Brown: I call for the note dated May 11th, 1922.

[fol. 50] (Produced by defendant's counsel.)

Q. Is that the note that was signed by you?
A. Yes, sir.
Q. That note was sent to you by Mr. Lynch?
A. Yes.
Q. And when you received the note did you sign it?
A. Yes.
Q. Then what did you do with it?
A. Sent it to A. B. Leach & Company.
Q. That is dated May 11th, 1921, for $15,000?
A. Yes.
Q. A collateral note in the usual form providing for the payment at the rate of 7 per cent and the date on which the note is due is left in blank, and it recites that there has been delivered as collateral 20,000 Massachusetts Oil Refining 7's?
A. Yes.

Mr. Brown: I offer in evidence note dated May 11th, 1921.

"Plaintiff's Exhibit No. 15"

Philadelphia, May 11, 1921. $15,000. ——.

"A. B. Leach & Co., Inc.:

—— after date, for value received, the undersigned jointly and severally promise to pay to the order of A. B. Leach & Co., Inc. (hereinafter called the Company) at ——, in Philadelphia, Fifteen Thousand Dollars, in United States gold coin or its equivalent, with interest at the rate of 7 per cent per annum, having pledged to the Company as security for the payment of this and other liability of the undersigned to the Company, due or to become due or which may hereafter arise, the following property: 20 M Mass. Oil Ref. 7's.

[fol. 51] The undersigned agree to deliver to the Company additional securities to its satisfaction as it may from time to time demand, or should the market value of the securities collateral hereto suffer any decline to make satis-

factory payments on account, and also hereby give to the Company a lien for the amount of all the said liabilities upon all property or securities now or hereafter in the possession of the Company in which any of the undersigned has any interest, and also upon any balance or any deposit account with the Company. Upon nonpayment of this or any other liability, or non performance of any agreement hereunder, or in case of insolvency, bankruptcy or failure in business of the undersigned or any party hereto, this note shall forthwith become due and payable, without demand or notice and the Company is hereby authorized to sell the said securities and property, or any substitutes therefor or additions thereto, in any proportion, at any Broker's Board or at public or private sale, at its option, without demand, advertisement or notice, and the Company may purchase the same or any part thereof, free from any right of redemption, all of which is hereby expressly waived and released. After deducting all costs or expenses of every kind for collection, sale or delivery, the Company may apply the residue of the proceeds to pay any or all of said liabilities to the Company, whether then due or to become due, returning any overplus to the undersigned, who agree to be and remain liable for any deficiency. The Company may rehypothecate any collateral security to this obligation, or it may transfer this note and deliver any or all of the said collateral securities or property to the transferee who shall thereupon become vested with all the powers and rights herein given to the Company and the Company shall thereafter be relieved and discharged from any and all liability or responsibility in connection therewith.

Walter Peirson."

[fol. 52] (Letter of May 11th, 1921, from Mr. Lynch marked for identification "Plaintiff's Exhibit A.")

Q. What happened after that?

A. Some time after that I got a communication from A. B. Leach & Company asking me to pay off the loan. I called up Mr. Mather.

Q. I show you a letter dated March 21, 1922, with an inclosure. Is that the letter you received from A. B. Leach & Company?

A. Yes, sir.

Mr. Brown: I offer in evidence letter on the letterhead of A. B. Leach & Company, dated March 21, 1922.

"Plaintiff's Exhibit No. 16"

"Mr. Walter Peirson, 36th & Reed Streets, Philadelphia, Pa.

Dear Sir: In going over our books today, we find that we are still carrying your loan of $15,000 on $20,000 par value of Massachusetts Oil Refining 7's which was made on May 11, 1921. This matter has probably been overlooked by you and we will greatly appreciate it if you would make some arrangements to take it up.

We are not equipped to handle loans and as quite a few have accumulated on our books, any assistance that you might give us in clearing up your item will be very greatly appreciated.

Thinking it may be possible for you to arrange to do this at once, we are taking the liberty of enclosing bill with interest figured as of today.

Thanking you in anticipation of your co-operation, we are

Yours very truly, A. B. Leach & Co., Inc."

[fol. 53] Q. What did you do when you received this letter?

A. I called up Mr. Mather.

Q. Where did you get him?

A. At A. B. Leach & Company's office.

Q. You got him on the telephone?

A. Yes.

Q. What did you say to him and what did he say to you?

A. I told him of that letter.

Q. Of the receipt of this letter?

A. Yes, and the request for payment on the loan.

Q. And what did he say to you?

A. He said, "Oh, that is only a matter of form, let it run."

Q. And what did you do as a result of that talk?

A. I let it run.

Q. Did you make any memorandum of that?

A. I made a memorandum of that when he was talking with me in the office.

Q. What did you make the memorandum on?
A. On this.
Q. And by this you refer to the enclosure in that letter?
A. Yes, sir.

Mr. Brown: I offer in evidence statement March 21, 1922, as follows:

PLAINTIFF'S EXHIBIT No. 17

A. B. Leach & Co., Inc., Investment Securities, 115 South Fourth Street, Philadelphia, in account with Mr. Walter Peirson, 36th & Reed Sts., Philadelphia.

[fol. 54] Date: March 21, 1922

	Balance
January 1st, 1922, 20,000 Massachusetts Oil Ref. 7s	$15,000 00
Interest Jan. 1, 1922, to March 22nd, 1922, 2 mos. 21 days, at 7%	236 25
	$15,236 25

(Note in pencil:) "Mather says pay no attention to this; let it run as before."

Q. What happened after that?
A. That was in March of 1922, and in April of 1922 I got another request from them asking me to pay off the loan.
Q. What did you then do?
A. Then I wrote them the second letter.
Q. Did you type the letter yourself?
A. I did.
Q. On your typewriter?
A. Yes.
Q. As you had the other letter?
A. Yes, sir.
Q. Then, what did you do after you typed it?
A. Addressed the envelope and took the letter and the addressed envelope and the copy book out in the main office and got Joseph Stringer to copy it and mail it.
Q. Is this the copy of the letter which I show you?
A. Yes, sir.
Q. Will you refer to the copy letter book?

Mr. Henderson: I will ask for an offer of proof at this time.

Mr. Brown: I want to prove that he also cut this letter out of the book and the reason why he did it.

The Court: I do not see the materiality.

[fol. 55] Mr. Brown: I want to show that he has followed exactly the same practice with that letter which they admit receiving as with respect to the letter they deny receiving.

The Court: So far as it being evidence of it being copied into the book and cut out is concerned, I will let it go in for that purpose.

By Mr. Brown:

Q. Will you refer to the page in the letter book you took that from?

A. Yes, sir.

Q. That is page 135, is it, that you cut out?

A. Yes, sir.

Q. And did you see the scissors on this letter as you did on the other?

A. Yes, sir.

Mr. Brown: I offer in evidence letter produced by the defendant on the letterhead of Mitchell & Peirson, dated April 21, 1922.

PLAINTIFF'S EXHIBIT No. 18"

"Messrs. A. B. Leach & Co., 115 8th 4th St., Philadelphia.

DEAR SIRS: When the 20,000 Massachusetts Oil & Refining Bonds were bought from you it was expressly agreed that at any time I desired, you would take them off my hands at cost.

This I now ask you to do, calculate the interest, deduct the loan and mail me check for balance due me.

Very truly yours, Walter Peirson."

Q. What happened after that?

A. The next day I was called at my house at Radnor.

[fol. 56] Q. By whom?

A. Mr. Miller.

Q. That is the gentleman who sits next to Mr. Henderson?

A. I never met him before that time, but that is Mr. Miller.

Q. Did he say on the 'phone that he was Mr. Miller?

A. Yes.

Q. And who is Mr. Miller?

A. I believe he is vice-president of A. B. Leach & Company.

Q. What day was this?

A. April 22d, 1922.

Q. That was the day after this letter of April 21st?

A. Yes, sir.

Q. What did Mr. Miller say to you and what did you say to him?

A. He spoke about the loan.

Q. What did he say as nearly as you can recall?

A. Wanted me to take it up and I said that I did not intend to take it up, that I did not intend to pay that loan, that I wanted them to take back the bonds as they agreed to.

Q. Did you tell him what bonds they were?

A. All of them.

Q. Did you mention them by name?

A. I believe so.

Q. What did you say to him?

A. Massachusetts Oil & Refining bonds, William Whitmer bonds and National Oil bonds.

Q. What did he say to you in answer to your request?

A. He said that Mr. Mather denied ever having made such an agreement.

Q. What did you say to him?

[fol. 37] A. I said I will make Mr. Mather go on the stand and swear to that.

Q. Then, what did he say to you?

A. I told him I was going to California and he said when are you going and I said in an hour, and he said when will you be back and I said in four weeks, and he hung up.

Q. When you came back from California, what did you do?

A. I went to your office and saw your father, Mr. Henry P. Brown, and stated the whole case to him.

Q. As a result of what you said to us, were or were not these bonds that you have mentioned tendered to A. B. Leach & Company?

A. Can I tell you how it was done?

Q. I will ask you how it was done.

A. Well, your father told me first to write a letter to him stating the whole thing.

Q. Without going into that, which is not evidence, as a result of that, what did you do?

A. Why we went to the office of A. B. Leach & Company and presented a letter to them which your father had dictated to me sending them back the bonds and asking them to take back the bonds, as they agreed.

Q. That was on July 14th?

A. 1922. July 14th, I know my son and I went together each with a similar letter.

Mr. Brown: At this time I desire to state of record that it is admitted by the affidavit of defense in paragraph 5, that the plaintiff on or about July 14th, 1922, demanded that the defendant repurchase the securities which the plaintiff had bought, but it is denied that the defendant entered into any agreement.

I offer that for the purpose of showing the tender of the [fol. 58] three sets of bonds to A. B. Leach & Company.

Q. For the purpose of checking the record, will you tell me the total amount that you paid for these three groups of bonds?

A. $39,250.

Q. Will you give me the separate item? How much did you pay for all of the Massachusetts Oil bonds?

A. The first item $9,800.

Q. Then there were interest charges?

A. That is without interest $9,800.

Q. And what was the total amount you paid?

A. $10,023.61.

Q. And what was the total amount you paid for Massachusetts Oil?

A. $19,600 plus $315 interest.

Q. How much was the interest on the Whitmer bonds?

A. $223.61

Q. How much did you pay for the National Oil?

A. $9,850 plus $287.78 interest. Now, here is another check if you want this. I paid for the National Oil by check.

Mr. Brown: I offer in evidence check dated March 28, 1921.

"Plaintiff's Exhibit No. 19"

"Walter Peirson

Philadelphia, March 28, 1921. No. 158

Pay to the order of A. B. Leach & Co. ten thousand one hundred and thirty seven 78 100 dollars. Payable through the Philadelphia Clearing House

Walter Peirson.

(fol. 59) To the Land Title & Trust Co.

$10,137 78 100. Philadelphia (2.69).

(Stamped on back:) Pay to the order of Girard National Bank. A. B. Leach & Company, Inc. Received payment through the Clearing House Mar. 30, 1921. Girard National Bank."

Mr. Brown: It is agreed that as of July 14, 1922, the Massachusetts Oil & Refining Company bonds had a value of $295 per thousand, that National Oil had a value of $230 per thousand and William Whitmer & Sons bonds had a value of $330 per thousand.

Q. What happened after July 14th, 1922, with respect to these bonds?

A. Why then we began suit.

Q. I mean as to the bonds independently of this suit.

Mr. Henderson: Objected to as having nothing to do with the case.

The Court: The value of the bonds is established as of that date. I don't know that it is necessary to inquire what was done with them. I assume you are suing for the difference between the price you paid and the value which has been agreed upon?

Mr. Brown: That is right, sir.

Cross-examination.

By Mr. Henderson:

Q. You purchased many securities outside of these three particular ones from other bond houses didn't you?

A. Yes, considerable.

[fol. 60] Q. You have been a successful business man for this thirty-five or thirty-six years? Modesty will permit you to say so?

A. Yes, I guess so. I will say yes to that.

Q. Mr. Mather lives in the same vicinity you do, does he not?

A. Radnor Township, yes.

Q. Mr. Mather, you knew was a salesman, did you not?

A. I knew very little about his business.

Q. You knew nothing except what he told you?

A. I think that is true.

Q. That is all you know about him?

A. I think that is true.

Q. You have been in business thirty-five years, you say?

A. Thirty-seven.

Q. And this man you gave orders for some $40,000 of bonds?

A. Yes.

Q. Do you recall receiving the circular prior to the 25th day of May, 1920, with reference to the William Whitmer bonds from A. B. Leach & Company?

A. I don't question it, but I do not recall it, no, sir.

Q. You don't have it here with you, do you?

A. No.

Q. As a matter of fact you recall at the last trial Mr. Mather stated that he did not see you until after the purchase of these first bonds, don't you?

A. Yes, sir, I do.

Q. He stated that these bonds, the first purchase of $10,000 William Whitmer & Sons, the order was given him through your son, Walter Peirson, Jr.?

A. I recollect that, yes, sir.

Q. And as matter of fact Mr. Mather writes you a letter [fol. 61] and thanks you for this order placed through your son, doesn't he?

A. Show me the letter.

Q. That is the letter.

A. Yes, I received that letter.

Q. Do you remember Mr. Mather stated he wrote you that letter because he had not personally seen you and he wanted to thank you for this order which was given to him through your son?

A. No, I don't recollect that he wrote that letter because he didn't personally see me. As a matter of fact he did see me.

Q. That is what you state?

A. Yes, positively.

Q. On the 25th of May, 1920, he says "My dear Mr. Peirson: I write to express my thanks and appreciation for the nice bond order Walter gave me today for your account." That is correct?

A. I got Walter to tell him I would take the bonds.

Q. Now, how long prior to that time was it that you saw Mr. Mather?

A. I couldn't say, within a very short time.

Q. Within a day or two?

A. It might have been a day or two, or it might have been three or four days or a week. I couldn't say.

Q. Might have been a couple of weeks?

A. I shouldn't think it was that long.

Q. Sometime within two weeks prior to the 25th of May you state that Mr. Mather called upon you?

A. Yes.

Q. You got this letter, didn't you?

A. Yes.

Q. You also got a letter on the same day from A. B. Leach & Company, "We take pleasure in confirming sale to you of 10,000 William Whitmer bonds the order being [fol 62] given to our Mr. Mather by your son Walter Peirson, Jr."

A. Let me see the letter again.

Q. They are all the letters that you introduced in evidence.

A. Yes, I got that letter.

Q. Did you ever acknowledge it?

A. No, I think not.

Q. Never wrote back?

A. I think not.

Q. Now, just what did Mr. Mather say to you about repurchasing these securities?

A. He says you take no risk. You cannot lose on them. Any time at all that you wish A. B. Leach & Company will take them back from you at the price you paid for them.

Q. Now, you state that that was made sometime two weeks prior, within two weeks prior to the 25th of May?

A. I am not positive what time, but sometime prior.

Q. Well, approximately?

A. Yes.

Q. He made that statement to you?

A. Yes.

Q. That statement was made in your presence and the presence of your son?

A. No, not in the presence of my son.

Q. In your presence alone?

A. Yes.

Q. At your office at Thirty-sixth and Reed Streets?

A. Yes. My son introduced him and went out and left Mr. Mather there.

Q. And he made that statement to you?

A. Yes.

Q. And in reliance on that statement you sent an order [fol. 63] through your son to Leach & Company to purchase some bonds?

A. Yes.

Q. And you knew Mr. Mather was employed as a salesman by A. B. Leach & Company?

A. He was connected with A. B. Leach & Company. His title——

Q. You don't know his title?

A. No.

Q. Did you know whether he was an officer of the company?

A. I don't know.

Q. Did you try to find out?

A. No.

Q. You did not try to find out anything?

A. I knew he was connected with A. B. Leach & Company.

Q. Did you know whether he was an officer or a director of A. B. Leach & Company?

A. I don't think he was.

Q. And you didn't try to find out, either, did you?

A. No.

Q. As a matter of fact you knew he was a salesman for A. B. Leach & Company, didn't you?

A. He represented A. B. Leach & Company. A salesman who sells bonds may carry different kinds of bonds, but he was representing Leach & Company selling bonds which they brought out. In other words, he called it "our bonds."

Q. Your son was in the business at one time, wasn't he?

A. No, sir. I had one son who was but he has been dead for over five years.

Q. You had one son in the business, did you not?

A. I had one son in the business, yes.

Q. You knew something about this business, didn't you?

[fol. 64] A. Only as a buyer.

Q. Only as a buyer and yet your son was in the business?

A. Well, I wasn't in the business.

Q. You didn't know anything about your son's business?

A. No, not the details of it.

Q. Did you know anything about the substance of it?

A. No.

Q. It did not bother you?

A. No.

Q. You did not concern yourself with it?

A. Oh, no. In a general way I was interested in my son but the details of his business I knew nothing of at all.

Q. He also brought out securities, didn't he?

A. I don't know. I don't think so.

Q. Did you ever know any other houses in Philadelphia to bring out securities?

A. I have no doubt.

Q. No question about it, is there?

A. I have never bought any of them that were brought out by any other Philadelphia house.

Q. You never bought of any other Philadelphia house?

A. Not that I recall.

Q. You have bought securities, haven't you?

A. Oh, yes.

Q. And quite a lot of them?

A. Some, yes. A considerable quantity.

Q. And do you mean to tell this jury that A. B. Leach & Company are the only people in Philadelphia that brought out any securities that you ever bought?

A. Oh, no. You asked in Philadelphia. Whether there was any other house in Philadelphia that had brought out securities that I bought from. I don't recall any. Now, as [fol. 65] a matter of fact, when I buy bonds or stock, as a rule, I am not so much interested in who brought them out. There is something offered me for sale.

Q. Well, these were offered to you for sale, weren't they?

A. Yes, and these I knew were brought out by A. B. Leach & Company.

Q. How did you know it?

A. Mr. Mather told me so.

Q. And that is your only reason for knowing it, isn't it?

A. Why, yes. They admit it.

Q. They brought them out, but not in the way you are testifying to. I will bring that out in a minute. You mean by bringing out securities that they would do the same as any other banking house, if Mitchell & Peirson needed to borrow money you go to a banking house and they would buy your securities and float them. Is that the ordinary way it is done?

A. We don't have securities. We borrow on a note.

Q. I am asking if you had to borrow money.

A. We never do. We are not incorporated. We have no securities.

By Mr. Brown:

Q. Who do you refer to by "we"?

A. Mitchell & Peirson.

By Mr. Henderson:

Q. You stated that you knew Leach & Company were bringing out these bonds?

A. Yes.

Q. Now, you don't mean any more by that than saying that they sold these securities, do you?

A. Yes, I do. They were behind them. They were the father of it.

[fol. 66] Q. Now, then what have you got to show they were the father or the mother or the stepchild?

A. Well, they themselves admitted it.

Q. Mr. Mather you state told you that. Did you ever call up A. B. Leach & Company to verify it or find out anything about it?

A. I did not.

Q. With such an extraordinary agreement to repurchase securities, do you recall the maturity of these securities, how long they had to run?

A. I cannot recall it now.

Q. Isn't that on your paper?

A. No.

Q. Well, the Massachusetts Oil bonds were due in October, 1929, a period of nine years from the time you bought them, were they not?

A. I don't know.

Q. Would you say that was incorrect?

A. I don't know whether it is correct or not.

Q. Well, the bonds had a few years to run. They were not due in a year or two?

A. No.

Q. The National Oil bonds were due in May of 1924, a period of practically three years from the date you bought them, and the William Whitmer Parsons bonds were due in 1925, over five years from the time you bought them. Now, with this extraordinary contract to repurchase these securities, notwithstanding you received a letter on the twenty fifth day of May from A. B. Leach & Company confirming the sale to you of order being given to our Mr. Mather by your son, Mr. Walter Peirson, you say nothing to A. B. Leach & Company about this agreement at that time, do you?

A. I do not. I had perfect confidence in Mr. Mather's statements and perfect confidence in what he said about A. B. Leach & Company.

[fol. 67] Q. But you took no trouble whatsoever to find out whether what he was telling you was correct or incorrect?

A. I believed him.

Q. And yet you knew that he was an agent?

A. Well, if you choose to call him an agent, yes.

Q. What do you want to call him?

A. Well, I will call him an agent if you wish.

Q. Then we agree on that. Now, you got a letter on the twenty third day of June, "Enclosed please find memorandum showing amount due on your purchase of 10,000 Whitmer Parsons bonds"?

A. Yes.

Q. And you paid the money by your own check, didn't you?

A. Yes.

Q. And said nothing to A. B. Leach & Company about this agreement at that time, did you?

A. No.

Q. On the twentieth day of September, 1920, you received a letter from A. B. Leach & Company, "We take pleasure in confirming sale to you through our Mr. Mather of 10,000 Massachusetts Oil Refining bonds for delivery to suit your convenience." You received that letter?

A. Yes.

Q. You never acknowledged it, did you?

A. No.

Q. You never said to them your letter does not correctly represent your transaction?

A. I did not answer it at all.

Q. You did not acknowledge this letter of September 20, 1920, to A. B. Leach & Company stating anything whatsoever, did you?

A. I did not.

Q. And you did not call them up?

A. I did not.

[fol. 68] Q. Did not get in touch with them at all?

A. No.

Q. Now, as I recall that contract, so called, provided that they would allow you 1 per cent above the market on Liberty bonds on your purchase price?

A. Yes.

Q. Now, on that agreement what was the agreement on what you were to get back in case you wanted them to take the bonds off your hands, the Liberty bonds or cash or what?

A. Well, now, that recalls in one of the conversations I had with Mr. Mather over the 'phone he reminded me that they had given me 1 per cent more on the Victory bonds and I was only entitled to 97 on the Massachusetts Oil and Refining bonds.

Q. In other words they, if at any time you wanted to turn back the Massachusetts Oil bonds, were to give you 97?

A. Yes.

Q. Now, when was that conversation and where did you have it, that conversation which you just recall now for the first time?

A. I won:in't want to swear to the when and where. Can I say wha I think?

Q. Most assuredly.

A. I think it followed this letter of mine of May 9th, 1921. That is the only place it fits in.

Q. It didn't fit in at the time of September, 1920, did it, when you bought them?

A. What didn't fit in? My talk with him? There wasn't any.

Q. Perhaps we are getting mixed up with Mr. Stinger's fitting the letter and some other things.

Mr. Brown: I would like an explanation of that remark, "fitting in the letter and some other things." I think that is entirely improper and I ask your Honor order it stricken [fol. 69] from the record.

The Court: The remarks of counsel have no place in the record. Let it be stricken out.

By Mr. Henderson:

Q. You have stated it fits in after the letter of May 9th, 1921. Tell us what you mean by that?

A. I had a talk with Mr. Mather over the 'phone about the Massachusetts Oil and Refining bonds not being good collateral and I wanted him to take them off my hands. Then he said you would not be entitled to 98 but you would

only be entitled to 97, because we gave you one point over on the Victory loan bonds.

Q. Let us go back to the time you bought them. You were not paying cash for these bonds, were you?

A. Just as good as cash.

Q. Will you answer my question?

A. United States Victory bonds I paid.

Q. My question will take a yes or no answer. You were not paying cash for these bonds at that time, were you?

A. No.

Q. You were turning over Victory bonds at 1 per cent above the market?

A. So they said.

Q. Well, you got credit for it, didn't you?

A. Well, I took their word for it.

Q. Is there any doubt about it?

A. I don't know of any.

Q. Well, are you throwing a doubt on that, that they did not give you 1 per cent above the market?

A. I believe everything they said at that time. Now, I would be a little bit dubious about it.

Q. Have you any notes to prove what you are testifying to at this time with reference to those Liberty bonds?

[fol. 70] A. They recommended all these purchases to me.

Q. By they you mean Mr. Mather?

A. A. B. Leach & Company recommended them when they offered these bonds as a good investment, and all the companies went into the hands of the receiver.

Q. Now, you got that in, have you?

A. And they unqualifiedly recommended these bonds as an investment.

Q. They sent out circulars upon which they recommended them?

A. I believe that is so.

Q. Did you read them?

A. I did.

Q. Then, you did not entirely rely upon Mr. Mather's statement, did you?

A. The guarantee was Mr. Mather's.

Q. Mr. Mather's was the guarantee and the circular was A. B. Leach & Company. Do you see anything on the

bottom of the circular with reference to the information contained in the circulars?

A. I don't recollect but there is usually a printed form.

Q. A printed form usually is on the circular, is it?

A. Yes.

Q. You don't have any of these circulars, do you?

A. Not with me.

Q. Do you recall on the bottom it states that the information contained in this circular has been obtained from sources we consider reliable and while not guaranteed is accepted by us as accurate?

A. That is the usual thing.

Q. And this was on these, too, was it?

A. I suppose so.

Q. At the time you turned over these Victory bonds to A. B. Leach & Company for $20,000 Massachusetts Oil and [fol. 71] Refining, at that time you did not know exactly what you were to get if you turned these Massachusetts Oil bonds back?

A. I was to get back what I really paid.

Q. At the time you purchased the $20,000 Massachusetts Oil in September of 1920, at that time you had received a credit at 1 per cent. above the market value on Victory bonds in payment of the Massachusetts Oil bonds. That is correct?

A. That is correct.

Q. Now, you have further testified that it was not until after the 9th of May, 1921, in your conversation with Mr. Mather?

A. I know they said they allowed me 1 per cent. over the market on Liberty bonds.

Q. You are anticipating what I am going to ask you. I stated it was not until after May 9th, 1921, in your conversation with Mr. Mather that you know exactly what they were to pay you for the Massachusetts Oil if you asked them to take them back?

A. Well, now, if at any time they had offered to take them back——

Q. Well, they never have?

A. ——and had drawn my attention to the fact that they had paid me one point over the market on United States

Victory loans I would naturally expect them to take one point off of the Massachusetts Oil and Refining Company bonds at that time.

Q. But that was not definitely settled prior to the 29th of September, 1920, was it?

A. Where do you get the 29th of September?

Q. Well, September, 1920. I will put it that way.

A. Where do you get your date, September, 1920?

Q. From the letters.

A. This talk I had with Mr. Mather was about May 10th, 1921.

[fol. 72] Q. Now, in February of 1921 you bought 10,000 National Oil, didn't you?

A. Yes, sir.

Q. You got a letter dated the 26th of February, 1921, "We are pleased to confirm sale to you through our Mr. Mather for 10,000 National Oil at 98." You got that letter, didn't you?

A. Yes.

Q. You didn't answer it, did you?

A. No.

Q. You didn't ask A. B. Leach & Company anything about this agreement?

A. No.

Q. When you received this letter which shows on its face a plain, ordinary purchase, you didn't say that was a conditional purchase, did you?

A. I had absolute confidence in what was said to me.

Q. You said nothing to A. B. Leach & Company?

A. No.

Q. You never made any investigation of A. B. Leach & Company to see whether Mr. Mather was authorized to make any such agreement?

A. I had no suspicion, no reason.

Q. Although you knew you were dealing with Mr. Mather as agent?

A. Representing A. B. Leach & Company, speaking for them.

Q. As an agent?

A. Well, whatever you call him.

Q. On May 9th you now recall that you typed this letter?

A. I wrote it personally.

Q. And you gave it to Mr. Stinger and you claim that he mailed it?

A. I don't claim that he mailed it. He did. He always did.

[fol. 73] Q. He claimed that he mailed it?

A. Yes.

Q. You don't know whether he mailed it or not, do you?

A. I do not.

Q. You do know that A. B. Leach & Company denied ever receiving it, don't you?

A. I do.

Q. You never got any reply to that letter, did you?

A. Only this one on the 'phone from Mr. Mather.

Q. You never got any reply from A. B. Leach & Company to this letter, did you?

A. No, but this one of Mr. Mather fits right in. It couldn't have come for any other reason.

Q. It couldn't have come for any other reason?

A. No.

Q. You never had any reply to this letter which fits in here, this letter of May 9th, 1921?

A. I never received any letter, no.

Q. At that time you needed some money, didn't you?

A. Yes.

Q. You and Mr. Lynch were interested in business together at that time, weren't you?

A. A special thing, yes.

Q. You told Mr. Mather that you needed some money in your business, didn't you?

A. I told Mr. Mather that the bonds had been refused as good collateral and I wanted A. B. Leach & Company to take them back as they agreed to.

Q. You wanted what?

A. I wanted A. B. Leach & Company to take the bonds back as they had agreed to.

Q. You told him that at that time?

A. Yes, sir.

Q. Why didn't you say that at the first trial?

[fol. 74] A. I really don't know that.

Q. You now state immediately after May 9th, 1921, you asked Mr. Mather to take these bonds back?

A. Yes.

Q. Where did that conversation come from?

A. From the 'phone.

Q. From your office?

A. Yes.

Q. To Mr. Mather?

A. Yes.

Q. What day was that?

A. I guess that was the tenth of May, 1921.

Q. Not sure, are you?

A. It fits right in. That is all.

Q. Now, you did not mention that at the first trial at all, that you ever said anything to Mr. Mather about taking these bonds back, did you?

A. Well perhaps you will have some other evidence when your case goes on.

Q. Don't argue, but just answer my question.

A. I don't recollect saying it.

Q. You didn't as a matter of fact?

A. All right.

Q. Now, they did not take them back, did they?

A. They did not, I am sorry to say.

Q. But the very next day, on the eleventh of May, 1921, you put your signature to a note for $15,000?

A. Yes.

Q. Did you say anything to A. B. Leach & Company at that time?

A. I did to Mr. Mather.

Q. You said nothing to A. B. Leach & Company itself, did you?

A. Not unless he represents A. B. Leach & Company. He was talking for A. B. Leach & Company when I was talking to him. I thought that he was.

Q. You signed a note for $15,000 for A. B. Leach & Company, put your name right on the bottom of it?

[fol 75] A. Yes, sir.

Q. And you are a successful business man and you know the responsibilities and obligations of signing a note, don't you?

A. Yes.

Q. But you still had this repurchase agreement, where you could have made them, according to your own words,

take these $20,000 of bonds instead of signing a note for them?

A. Well, Mr. Mather said, when I said that the trust company wouldn't accept the bonds as good collateral that they didn't know what they were talking about. He says those bonds are as good as wheat. We will loan you $15,000 on them, and I said perhaps maybe the trust company officer didn't know what he was talking about. I still had a very high opinion of A. B. Leach & Company and Mr. Mather's word.

Q. And nevertheless when a trust company and your friend Mr. Lynch had told you they would not take these bonds because they were not good collateral, on the very next day you signed a note for $15,000 when you could have, according to your own terms, have made them take these bonds off your hands. That is correct, isn't it?

A. Well I thought perhaps the trust company officer didn't know. You see they were not listed bonds. They were not listed on the market. They were not something that you could turn and say they sold yesterday for so and so and last week for so much.

Q. These bonds were dealt in in New York and it was perfectly easy to find out what they were worth and what they were selling for. You made no effort to find out what they were being sold at that time for, did you?

A. No.

Q. What bank turned you down on these bonds?

[fol. 76] A. I don't know. You will have to ask Mr. Lynch that.

Q. Now, these bonds you state were with some other securities for this loan?

A. Yes.

Q. Do you remember Mr. Mather telling you prior to the ninth day of May, that these bonds had a two points profit on them and whether you wanted to sell them out?

A. No, I don't recall that.

Q. Do you recall his making that statement to you at any time?

A. I do not.

Q. And you stated you wanted to hold them?

A. I did not.

Q. Now, after the 11th day of May, 1921, did you receive from A. B. Leach & Company the interest on these Massa

chusetts Oil bonds? I hand you some checks which may help you.

A. Why I have got a memorandum Massachusetts Oil & Refining bonds paid interest January 12th, 1921, and July 20th, 1921, $700 each.

Q. Is that your signature to that check for $700?

A. That is my endorsement, yes.

Q. It is your signature, isn't it?

A. Yes.

Q. Is that your signature to the check for $29.17?

A. Yes, sir.

Q. And check No. 5315 for $15,000, does that represent the loan?

A. May 11, 1921, yes. You see how that is endorsed. I call your attention to that endorsement.

Q. Land Title & Trust Company for deposit to your credit?

A. Yes, not by me.

Q. You got the money?

A. Yes, but I didn't deposit that check.

[fol. 77] Q. You had Mr. Lynch deposit the check?

A. Yes, Mr. Lynch got it. That is what I was trying to tell you.

(Check identified by witness marked for identification "Defendant's Exhibit Nos. 1, 2 and 3.")

Q. You received interest on these bonds which was due the 1st of July, 1921, in the sum of $700, did you not?

A. I did.

Q. And on or about the 4th of January, 1921, you received a statement from A. B. Leach & Company, did you not?

A. Yes, sir.

Mr. Henderson: I call for that original statement.

Mr. Brown: If you have a copy you may use it.

By Mr. Henderson:

Q. At that time they collected the interest on these bonds up to the 1st of January, 1922, and deducted the interest on the loan up to the 1st of January, 1922, and sent you a check for the balance which amounted to $29.17?

A. That is right.

Q. And that is the check which you deposited?

A. Yes, sir.

Q. During none of these transactions did you say anything to A. B. Leach & Company about this agreement to repurchase, did you?

A. No.

Q. As a matter of fact on the 21st of March, 1922, A. B. Leach & Company wrote you a letter which is your Plaintiff's Exhibit No. 16, and stated that they wanted the loan paid?

A. Yes.

[fol. 78] Q. In which they demanded payment of the note?

A. Yes.

Q. After that you stated you called up Mr. Mather and he told you to let it run?

A. Yes.

Q. In the meantime do you recall Mr. Mather calling you up about this loan and whether you wanted A. B. Leach & Company to sell these bonds and you told them no, that you did not want to take the loss at that time?

A. I don't recall that at all.

Q. You don't recall that conversation?

A. No, sir.

Q. Now, then between the 21st of March, 1922, and the 20th of April, 1922, you received a letter from Price, Waterhouse & Company, did you not?

A. Yes.

Q. Price, Waterhouse & Company were the auditors going over the books of A. B. Leach & Company?

A. Yes.

Q. You told them that this loan obligation was an obligation against you, did you not?

A. $15,000, yes. I never denied it.

Q. You said nothing to them at that time that there was any agreement that they had to take these bonds back, did you?

A. No.

Q. On the 20th of April, 1922, Leach & Company again wrote to you for payment of this account, did they not?

A. Yes.

Q. I show you a letter of April 20th, 1922, and ask you whether you recall receiving that letter from A. B. Leach & Company.

A. Yes.

Q. Where again they ask for the repayment of the amount due, do they not?

[fol. 79] A. Yes, sir.

Q. They say "Price, Waterhouse & Company have recently audited our books and have reported to our New York office that we loaned you $15,000 on $20,000 par value Massachusetts Oil Refining Company 7 per cent bonds. You will no doubt recall we made this loan May 11th, 1921, about a year ago, and at the time we understood it was to be for only a short period. Later you advised us you would take it up upon your return from abroad, last fall. As we do not make a business of loaning money and only did this as an accommodation to you, our New York office have instructed us to request you to pay it. Will you therefore please comply with their request and reply." You got that letter?

A. Yes.

Q. Immediately after that is when you wrote your letter of April 21st, 1922, is it not?

A. Yes.

Q. In which you stated that when the bonds were bought it was expressly agreed that at any time you desired they would take them off your hands at cost?

A. Yes.

Q. What did A. B. Leach & Company do immediately upon receipt of that letter?

A. The next day, on April 22d——

Q. Which would have been the day it would have been received, I presume?

A. Yes. Mr. Miller called me on the 'phone at my home at Radnor.

Q. And did he or did he not deny that any such agreement was ever made with you?

A. He did not start off with that.

Q. He started off with what?

A. He asked me how about the loan and I refused to pay the loan. I told him they had guaranteed to take back the

bonds and I wanted them to do so. Then he said Mr. [fol. 80] Mather denies he ever made such an agreement.

Q. What else did Mr. Miller say to you?

A. Then I told him that I was going to California and he said when, and I said in an hour, and he said when will you be back and I told him in about four weeks and then he hung up.

Q. Didn't he ask for an interview at that time?

A. He did not.

Q. Do you remember testifying to that at the first trial?

A. To what?

Q. That he asked for an interview.

A. I don't think so.

Q. I show you on page 21 of the notes of testimony of the last trial where you were asked what did you say to Mr. Miller in this connection and your answer is, "I said I refused to pay the loan and I wanted him to take the bonds back as you agreed to. He said well, Mr. Mather never agreed to take them back. I says I will put Mr. Mather on the stand and make him swear to that. He then asked for an interview and I told him I was going to California and he said when, and I said in an hour and he said when will you be back, and I said four weeks and he hung up." Do you want to correct your statement now, that he did not ask for an interview?

A. He perhaps did. If I made that statement then it is so.

Q. Did you write this letter of April 21st, 1922?

A. I did.

Q. The same typewriter?

A. Yes.

Q. You did not produce a copy of this at the last trial, did you?

A. Certainly.

[fol. 81] Q. You did not produce the copy torn out of the book at the last trial?

A. April 21st, yes.

Q. It isn't in the evidence?

A. We produced it.

Q. Well, there is nothing in the evidence to show that that letter was introduced whatsoever, is there?

A. Mr. Brown had both of them. Those were cut out from this book at that time. I kept them both out at the same time and took them up to Mr. Brown's office.

Q. But the last time the copy of this letter of April 1st, 1920, from your copy book was not introduced in evidence in the case or brought out. Do you recall that or do you not?

A. I don't know, but I thought it was.

Q. You are not sure, are you?

A. I know Mr. Brown had it in his possession.

Q. Now, when did the Whitmer bonds default in their interest?

A. I think the last credit of interest from the Whitmer bonds was on March 3d, 1922.

Q. When did you deposit them with the Bondholders' Protective Committee?

A. I cannot tell you.

Q. Would it be about the 19th of June, 1922?

A. I couldn't tell you that.

Q. Well, can you tell us approximately?

A. Before depositing them I consulted Mr. Henry P. Brown.

Q. I am not interested in what you learned from him, but when did you deposit them?

A. The date I couldn't tell you.

Q. Was it after your letter of April, 1922, or before?

A. I would say after.

[fol. 82] Q. Did you consult Mr. Brown before April 21st, 1922, or after?

A. I think after.

Q. So therefore it must have been after April 21st, 1922?

A. I think so, yes.

Q. I show you your letter of July 17, 1922. Is that your signature?

A. Yes.

Q. Is that your letter to A. B. Leach & Company?

A. Yes, that is it.

Q. Read that letter and see if it refreshes your mind at all as to when you perhaps deposited these bonds with the Bondholders' Protective Committee?

A. It says here William Whitmer Sons bonds. These bonds are now on deposit with the creditors' committee and I will obtain the same and tender them to you unless it would be useless to do so.

Q. Therefore, it must have been before the 17th of July, 1922, was it not?

A. Yes.

Q. So it was sometime between the 21st day of April, 1922, and the 17th day of July, 1922, that you deposited these bonds?

A. Yes.

Q. Why did you deposit them?

A. Can I answer that my own way?

Q. I will ask you the question this way. Had the interest been defaulted on these bonds or not?

A. What is the date?

Q. I don't know but they were deposited sometime prior to July 17, 1922.

A. The last credit I have of interest is March 3, 1922. Whether the interest defaulted or not, I don't know.

Q. Why did you put them up with the committee?

[fol. 83] A. I was advised by Mr. Brown it would not alter my situation in this case at all.

The Court: Just say you did it under advice of counsel.

The Witness: Yes, I did it under advice of counsel.

By Mr. Henderson:

Q. You deposited the bonds?

A. Yes.

Q. And you deposited them for the reason there must have been something the matter with the bonds. What was the reason?

A. Why, the company went in the hands of the receiver.

Q. When did the Whitmer Company go into the hands of the receiver?

A. I don't know.

Q. Were you subjected to any expense in connection with this Bondholders' Protective Committee?

A. No.

Q. Did you ever receive a copy of this plan of reorganization of William Whitmer & Sons Company?

Mr. Brown: Objected to. Mr. Henderson has objected to the introduction of evidence after July 4th when we made the tender. I take the same position with respect to this. It seems to me it does not make the slightest difference whether these bonds were deposited or not. It is entirely irrelevant. The question is whether these bonds were tendered. It is admitted they had a certain value at that time and it seems to me all this other evidence which your Honor ruled on in my direct examination is entirely irrelevant.

Mr. Henderson: My purpose is to show that Mr. Pierson deposited these bonds and to advise the jury whether or not if this man had a repurchase agreement he would take such [fol. 84] action, subjecting himself to expense prior to the tendering of these bonds on July 14th, 1922. In other words he takes actions and entails obligations and responsibilities and it it is for the jury to determine if a man had such an agreement as he claims whether he would have done what he did do.

The Court: I don't see why that is objectionable, Mr. Brown. It is cross examination. Of course, your case is based on the theory that you had an agreement under which the defendant would take the bonds and that you tendered the bonds and the defendant refused to accept the bonds, refused to make good. Of course, you are suing for the difference in value between the purchase price of the bonds and what they were worth at the time of the tender. I do not think the defendant is foreclosed by that from going into any cross-examination which would show an attitude inconsistent with what the plaintiff is trying to show.

(Objection overruled. Exception noted for plaintiff, by direction of the Court.)

(Recess from 1 o'clock to 2 o'clock P. M.)

2 o'clock p. m.

WALTER PERSON resumed.

Cross-examination (continued).

By Mr. Henderson:

Q. Just before recess we were talking about the $10,000 par value of William Whitmer & Sons, Incorporated, Parsons Pulp & Lumber Company bonds in which you testified that sometime between the period of April 21st, 1922, and [fol. 85] July 17, 1922, you deposited with the Bondholders' Protective Committee. During the recess have you been able to fix a definite time when they were deposited?

A. No.

Q. No better than before?

A. Only this, that when I came back from California, after being gone sometime, on the 22d of April, I was away about four weeks, and after I got back from California then I went and consulted Mr. Brown.

Q. And it was after that time that you deposited them?

A. Yes.

Q. So it may have been around the first of June?

A. Yes.

Q. That you deposited these bonds?

A. Yes.

Q. Now, of course, you undertook an obligation with the Bondholders' Protective Committee to be responsible for a certain proportion of the legal expenses and other expenses in connection with that committee, did you not?

A. I imagine so.

Q. That is the customary method, is it not?

A. Yes.

Q. What happened to these securities finally?

A. The Whitmer Parsons Company there is some kind of a new concern has been started.

Q. And you have got securities in the new concern?

A. Yes, a moderate amount of securities in this new concern.

Q. And you took them, didn't you?

A. Yes.

Q. I want to show you again the letter of July 17, 1922. Do you recall it?

A. Yes.

[fol. 86] Q. Did you write this letter yourself?

A. Yes.

Q. And this is one of the letters that is in your copy book as well as the others?

A. I believe so.

Q. That is the customary way you handle your letters?

A. Yes.

Q. And it was copied by Mr. Stinger?

A. I suppose so.

Q. But you are quite sure that you personally wrote this letter?

A. Let me see it again.

Q. I show it to you so there will be no mistake.

A. I wrote that letter.

Q. And that letter should be copied in your copy book?

A. It should be, yes.

Q. I ask you to look in your copy book and see if you can find it.

A. No, I do not.

Q. What explanation do you suppose there is for that?

A. I suppose it was not copied.

Q. Mr. Stinger did not carry out his duties?

A. Not necessarily. I may have mailed it without handing it to him.

Q. Do you mail some of your letters without handing them to him?

A. Occasionally.

Q. You are quite sure you personally typed this letter?

A. Sure.

Q. And sent it off?

A. Yes.

Q. But it is not in your copy book where it should be copied?

[fol. 87] A. I don't see it there.

Q. What percentage of your letters do you suppose do not get in your copy book?

A. Well, some unimportant letters. This is an important letter and should have been in there but some unimportant letters do not get in there. A very small proportion indeed of important letters.

Q. As a matter of fact you personally took this letter down to Leach & Company, didn't you?

A. Yes.

Q. It was a very important letter to you?

A. Yes.

Q. And it is not in your book?

A. It appears not.

Q. Well it is not, is it?

A. There is another book which once in a while is used. I had it in connection with a property that I was interested in in California and it is just possible that that was copied in that other book.

Q. Why didn't you cut it out of the other book and bring it in with these other two letters?

A. I didn't know you were going to ask for it.

Q. When you were cutting out these other letters, why didn't you cut out this other very important letter and bring it here also?

A. Didn't occur to me, I guess.

Q. In this letter to A. B. Leach & Company you state:

"GENTLEMEN: You have been informed both by me and my attorney, Henry P. Brown, that I desire you to repurchase certain securities which I bought from you under the agreement that you would repurchase the same at the price paid by me. As you have refused to state a time when you would be prepared to make payment in accordance with the agreement mentioned, I now tender the following securities [fol. 88] to you and demand payment from you of the amounts which I paid to you therefor:

$20,000 Mass. Oil & Refining Company 7% Convertible Gold Bonds, purchased September 23, 1929, for $19,600

#10,000 National Oil Company 1st Lien 7% Serial Gold Bonds, purchased February 28th, 1921, for 9,850

In addition to the foregoing securities, $10,000 William Whitmer & Sons, Inc., Parsons Pulp & Lumber Company Joint and Refunding 7% Gold Bonds were purchased by me for $9,800 under a similar agreement with you. These bonds are now on deposit with the Creditors' Committee,

but I will obtain the same and tender them to you, unless it would be useless to do so.

If you refuse to repurchase the securities now tendered, in accordance with my agreement with you, I will be obliged to take whatever action may be necessary to protect my interests."

Q. Now, as a matter of fact, you did not tender the 20,000 Massachusetts Oil & Refining Bonds at that time, did you?

A. Well, A. B. Leach & Company had them.

Q. This letter is not correct then? They were in their possession?

A. It was a formal presentation.

Q. You mean a formal presentation of this letter?

A. Yes.

Q. As a matter of fact you did not take any securities with you at that time and tender them to A. B. Leach & Company, did you?

A. That is probably so.

Q. That is what you testified to the last time, is it not?

A. Yes, that is probably so.

Q. So there may be no mistake I want again to show you your letter of May 9th, 1921, and also your letter of April (fol. 89) 21st, 1922, and I want to be sure that you wrote those letters yourself.

A. Yes, I am positive I wrote those letters.

Q. And both those letters got into that copy book?

A. Yes.

Q. Of course in the purchase price of these securities there was included interest?

A. Yes.

Q. You received that interest?

A. Yes.

Q. In other words if you bought a bond upon which the interest was payable on the first day of July and you bought it on the sixth day of July you got the coupon attached to that bond for those six days?

A. Yes.

Q. Therefore you got your money back so far as interest was concerned?

A. Yes.

Q. And the $15,000 loan the interest is due on that from the 1st of January, 1922. Is that correct?

A. I believe that is correct.

Q. And the principal amount of $15,000 is still due. Is that correct?

A. Yes, that is correct.

Q. Demand has been made upon you and you have refused to pay it for the reasons you have set forth?

A. Yes.

Mr. Henderson: At this time I wish to again make a motion I made last evening, and that is that I have requested Mr. Brown, giving him notice to produce the income tax returns of Mr. Peirson for the years 1921, 1922 and 1923, solely for the purpose of showing what he did on those returns on these particular securities, for this purpose, that whatever action he took in connection with those securities [fol. 90] it is for the jury to determine whether or not he did have a repurchase agreement, and anything he did that might throw light on the question to the jury that he may have had that agreement is perfectly proper in this case. I only want the returns for that purpose and I do not want to pry into anything else.

The Court: Before passing on that I would like to understand from you what action taken in his returns would be relevant and how?

Mr. Henderson: If Mr. Peirson deducted on his tax return a loss sustained in connection with these securities that would seem to me to be very relevant and material to the jury in determining whether or not a man who claimed he had a guarantee from a company to repurchase securities, whether he would not insist on their carrying out their guarantee, and would make a reduction on his tax return with reference to these particular securities.

Mr. Brown: I have no objection to Mr. Henderson asking this witness, who is under oath, whether or not he made any deduction under the circumstances. Mr. Peirson is willing to say exactly what he did do.

The Court: You may question him on his income tax returns.

Mr. Henderson: If your Honor please, I am not interested in questioning upon that. It seems to me the best

evidence in this case is the tax returns themselves. I do not care to question him with reference to it.

The Court: Well, I hardly think, unless you have some information about the tax returns, and you do not choose to examine him on what returns he made, I am in a position to order him to produce his income tax returns. It is simply a desire on your part, in behalf of your client to find [fol. 91] out whether he did make any statement in his income tax return which is inconsistent with the position he is taking now.

Mr. Henderson: And the simplest answer is the production of the income tax returns.

The Court: That is true, but I do not think you are entitled to have access to a man's collateral papers which have nothing to do with this case to enable you merely to find out a fact which may be either one way or the other and may not be there at all.

Mr. Henderson: In reply to that the answer is this, that we are not interested except in that one fact. Any admission against interest is evidence and it seems to me if this man has handled these particular securities on his tax returns and has deducted them, it is an admission against interest. If we are overruled in the matter we have no questions to ask with reference to it.

(Objection sustained. Exception noted for defendant by direction of the Court.)

Redirect examination.

By Mr. Brown:

Q. When you came back from your trip to California I understood you to say that you came to my father as your counsel?

A. Yes.

Q. Was or was not that the first time that you had seen counsel in the matter?

A. The first time.

Q. Was this letter of July 17th, 1922, prepared by Mr. Henry P. Brown?

A. Yes, an exact copy.

Q. He prepared it as your counsel?

A. Yes.

[fol. 92] Q. And you took it down and delivered it?

Q. And you took it down and delivered it?

A. I made a copy and took it down and delivered it.

Q. Mr. Henderson has asked you as to the maturity dates of these obligations or bonds of the Massachusetts Oil. He asked you how long they had to run. They didn't run very much longer than 1922, did they?

A. Before they went broke.

Q. They didn't run very strong after that, did they?

A. No, sir.

Mr. Henderson: I ask that answer be stricken from the record.

The Court: Of course Mr. Henderson's question was directed to the time they matured. I don't see that that is relevant.

By Mr. Brown:

Q. Is it or is it not a fact that at or about the time or shortly afterwards these three companies went into the hands of the receivers?

Mr. Henderson: Objected to.

(Objection overruled. Exception noted for defendant by direction of the Court.)

The Witness: I can not tell you exactly when they went into the hand of the receivers.

Mr. Brown: If your Honor please, I referred in the record at the last trial to an admission as to the value of these securities on July 14th.

I understand it is admitted that the same applies as of July 14th and as of July 17th, 1922. There is a difference of three days which I understand is not material at this time as to the respective values of these bonds.

I offer in evidence letter of July 17th, 1922.

"PLAINTIFF'S EXHIBIT No. 20"

[fol. 93] (Letterhead Mitchell & Peirson, Gray's Ferry Leather Works, Thirty-sixth and Reed Sts.)

"Philadelphia, July 17th, 1922.

A. B. Leach & Company, 115 South 4th Street, Philadelphia.

Attention of Mr. Charles T. Mather

GENTLEMEN: You have been informed both by me and my attorney, Henry P. Brown, that I desire you to repurchase certain securities which I bought from you under an agreement that you would repurchase the same at the price paid by me.

As you have refused to state a time when you would be prepared to make payment in accordance with the agreement mentioned, I now tender the following securities to you and demand payment from you of the amounts which I paid to you therefor:

$20,000 Mass. Oil & Refining Company 7% Convertible Gold Bonds, purchased September 23, 1920, for $19,600

$10,000 National Oil Company 1st Lien 7% Serial Gold Bonds, purchased February 28th, 1921, for 9,850

In addition to the foregoing securities, $10,000 William Wharton & Sons, Inc., Parsons Pulp & Lumber Company Joint and Refunding 7% Gold Bonds were purchased by me for $9,800 under a similar agreement with you. These bonds are now on deposit with the Creditors' Committee, but I will obtain the same and tender them to you, unless it would be useless to do so.

If you refuse to repurchase the securities now tendered, in accordance with my agreement with you, I will be obliged to take whatever action may be necessary to protect my interests.

Yours very truly, Walter Peirson."

[fol. 94] OFFERS IN EVIDENCE

I also offer in evidence paragraph 5 of the plaintiff's amended statement of claim reading as follows:

"On or about July 14, 1922, having become dissatisfied with the aforesaid securities, the plaintiff notified the defendant to that effect and demanded that defendant should repurchase such securities in accordance with the aforesaid understanding and agreement had and entered into with Charles T. Mather on behalf of defendant."

I offer that portion of the fifth paragraph of supplemental affidavit of defense reading as follows:

"5. Denied. It is admitted that the plaintiff on or about July 14, 1922, demanded that the defendant repurchase these securities which the plaintiff had bought from it."

Mr. Henderson: It certainly becomes objectionable under the Buehler case to offer just part of a paragraph. He either offers all or none. I certainly object to the offer and ask that it be stricken from the record.

(Objection overruled. Motion to strike out denied. Exception noted for defendant by direction of the Court.)

WALTER PEIRSON, JR., sworn and examined as follows:

Direct examination.

By Mr. Brown:

Q. You are a son of Mr. Peirson who just testified on the stand?

A. I am.

Q. How old are you?

[fol. 95] Forty-one.

Q. What is your business?

A. Leather manufacturer.

Q. With whom are you connected?

A. Mitchell & Peirson.

Q. How long have you been connected with them?

A. Twenty-four years.

Q. Do you know Mr. Charles T. Mather, and did you know him in 1920, 1921 and 1922?

A. I did.

Q. With whom was he associated?

A. A. B. Leach & Company.

Q. They are the defendants in this case?

A. They are.

Q. Tell us what association you had with Mr. Mather in connection with the purchase of these securities by your father?

A. Mr. Mather had sold me at least one of these securities about several months before my father became interested and he was very anxious to have my father buy some. He asked me several times, "Won't your father take some of these bonds?"

Q. Where did he see you?

A. In my office.

Q. Where is your office?

A. Thirty-sixth and Reed.

Q. Your office is with your father?

A. Separate offices in the same building. I spoke to my father about the bonds, particularly the first one which I had bought, which was the Natural Oil bonds, but he was not interested. He said he didn't care for oil bonds.

Q. Without repeating what was said in the absence of Mr. Mather, just tell us what you said to Mr. Mather in connection with the purchase by your father of these bonds? [fol. 96] What did you say to Mr. Mather about these bonds and what did he say to you in connection with the first purchase by your father?

A. On the first purchase Mr. Mather visited me and I introduced him to my father.

Q. Do you remember about when that was?

A. That was about May, 1920.

Q. And you introduced him to your father?

A. I did.

Q. How did you do it?

A. Took him into my father's office and presented him and departed, leaving him there.

Q. You left him alone with your father?

A. Yes.

Q. As a result of that interview did or did not your father give any instructions to you as to the purchase of these Whitmer-Parsons bonds?

A. Several days after that my father told me that I could call up Mr. Mather and tell him that he would take $10,000 worth of the Whitmer-Parsons bonds.

Q. What did you do?

A. I called Mr. Mather.

Q. Where?

A. At his office, A. B. Leach & Company.

Q. What did you say to him?

A. I said to him father says he will take $10,000 worth of the Whitmer-Parsons bonds.

Q. What did he say to you?

A. Well, I wouldn't remember exactly what he said. He was very much pleased to get the order. That is about all I know.

Q. And then followed this letter that has been referred to from Mr. Mather to your father?

A. Yes.

Q. Now, did you see Mr. Mather after that time?

A. Repeatedly.

Q. Did you see him with your father?

A. Yes, I have seen him in my father's office.

[fol. 97] Q. Were you there when your father made this other purchase of the Massachusetts bonds or the National Oil bonds?

A. I never was in the office when he gave the order.

Q. Were you there when Mr. Mather discussed them with him?

A. Very little.

Q. Did you ever hear your father and Mr. Mather discussing these bonds or the terms of the purchase?

A. No.

Q. What else do you know of this situation?

A. I know that Mr. Mather made the same statement to me to which my father testified.

Q. To your father?

A. In order to induce my father to first become interested he got me to make that statement to him that he guaranteed them.

Q. Tell us what happened at that time.

A. I said he told me he guaranteed the bonds as an inducement to get my father to become interested in them.

Q. What do you mean by guaranteeing the bonds?

A. He said A. B. Leach & Company would stand back of them, that father did not stand any chance of losing.

Q. Did he say anything about the position of A. B. Leach & Company?

A. He said they would take them back any time at what they cost if he was not satisfied with them.

Q. Do you remember the transaction that your father has related with respect to this letter of May 9th, and the effort on his part to obtain a loan on these Massachusetts Oil bonds?

A. At that time Mr. Mather called me up and he says to me, what is this I hear about your father?

Q. When was that?

[fol. 98] A. That was about May 10th.

Q. Do you remember the call sufficiently to let us know whether it was in the morning or afternoon?

A. It was in the morning.

Q. The morning of that day?

A. Yes.

Q. Mr. Mather was in the office?

A. Yes.

Q. Now, give us as fully as you can what he said to you and what you said to him.

A. He said to me what is this I hear about your father, and I said I don't know, what do you hear about my father? And he said, he wants us to take back his Massachusetts Oil bonds, what are we going to do about it? And I said I guess you will have to make good on your guarantee and take them back. He said they are perfectly good, what is the matter with them?

Q. Who said that?

A. Mr. Mather. I said the bank don't think they are good. He wanted to borrow some money on them and the bank wouldn't loan any money on them.

Q. You told Mather that?

A. Yes, and he said I will have a talk with your father about it. I said all right, go ahead and talk to him.

Q. Did Mr. Mather mention at that time to you that letter of May 9th that has been referred to here?

A. No.

Q. Did you communicate with him in any way at that time with respect to the desire on the part of your father to have these bonds repurchased?

A. No.

Q. What else do you know about the situation?

A. I don't think I can add very much unless there is something you want to ask me.

Q. After the letter of May 9th, 1920, did you know about [fol. 99] your father's subsequent letter of April 21st, 1922?

A. I did.

Q. Tell us what you know about that.

A. I know that father was going to California and I met him in Broad Street Station on returning and he told me Mr. Miller had called him on the 'phone demanding payment of the note.

Q. Did you know your father had written the letter of April 21st, 1922?

A. I did.

Cross-examination.

By Mr. Henderson:

Q. At the time of the first trial you had nothing to say about this conversation with Mr. Mather about the 10th of May, did you?

A. I wasn't asked.

Q. You have a suit brought against A. B. Leach & Company on the very same proposition, haven't you?

A. Only more so.

Q. Only more so?

A. More different defunct companies.

Q. Well, you bought some securities that were not defunct companies and you made some money on them, too, didn't you?

A. Very few.

Q. Just answer yes or no.

A. Yes.

Q. You are very much interested in the outcome of this case, aren't you?

A. I am.

Q. There is a copy of the statement of claim as originally served on A. B. Leach & Company with reference to your suit, setting forth a similar agreement. Was that settlement of claim sworn to by you?

[fol. 100] A. It was.

Q. I show you a copy of the amended statement of claim subsequently filed by your counsel and ask you if that was sworn to by you?

A. It was.

Q. Now, in your original statement of claim you stated that Mr. Mather first came in to see you around January of 1920, and then in your paragraph three you state that during June, 1920, he made this agreement with you. Do you recall that?

A. He made it on both occasions.

Q. Limit yourself to this document and look at paragraph three.

Mr. Brown: If your Honor please, it seems to me wholly irrelevant whether Mr. Mather came to see him.

Mr. Henderson: I wish to show in the first place he purchased securities prior to May, 1920, and that he claimed that Mr. Mather had made, this agreement prior to May, 1920, with him, and I am showing by his own statement he said it was made in June, 1920, and I want to show this witness' interest in the outcome.

The Court: Go on with your cross-examination and I will pass on it later.

By Mr. Henderson:

Q. In this original statement of claim you said the agreement between yourself and Mr. Mather was made prior to the month of June, 1920. Is that correct?

Mr. Brown: I object to any evidence on the issues framed between Mr. Peirson, Jr., and A. B. Leach & Company, an independent suit which has nothing to do with this litigation in any way.

The Court: It has nothing to do with this suit but if the witness made statements at other times inconsistent with

[fol. 101] what he is testifying to now, he may be cross examined as to those statements, for the purpose of impeaching those statements now.

By Mr. Henderson:

Q. On your original statement of claim you stated in paragraph three that during June, 1920, and prior to the purchase of any of the aforesaid securities it was agreed between you and Mr. Mather to take this stock back. Is that correct?

A. Yes, sir.

Q. And some of these securities had been purchased by you in January and February and April of 1920, prior to the twentieth of June?

Mr. Brown: Objected to.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

By Mr. Henderson:

Q. I show you paragraph three of the amended statement of claim. Now, there you have changed, have you not, and eliminated the words "during the month of June, 1920," and have stated "prior to the purchase of any of these securities"?

A. Yes.

Redirect examination:

By Mr. Brown:

Q. The case that Mr. Henderson is referring to is the case that you have instituted against this same defendant?

A. Yes, sir.

Q. That case has not yet been tried?

A. It has not.

[fol. 102] EDWARD D. C. LYNCH sworn and examined as follows:

Direct examination.

By Mr. Brown:

Q. Where do you live?
A. 1911 Chew Street, Philadelphia.
Q. What is your business?
A. Investment securities, member of Stock Exchange.
Q. How long have you been in that business?
A. For myself, since 1909.
Q. Where is your office?
A. Packard Building, southeast corner Fifteenth and Chestnut.
Q. Do you know Mr. Walter Peirson?
A. Yes, sir.
Q. How long have you known him?
A. Probably six or seven years.
Q. Were you or were you not with Mr. Peirson in May of 1921?
A. I was.
Q. And did or did not Mr. Peirson deposit with you $20,000 worth of Massachusetts Oil & Refining Company bonds?

Mr. Henderson: Objected to as immaterial.
Mr. Brown: With instructions to secure a loan on those securities.

(Objection overruled. Exception noted for defendant by direction of the Court.)

The Witness: He did.

By Mr. Henderson:

Q. Tell us what you did after that.
A. I took the bonds over to the Real Estate Trust Company.
Q. Who did you see there?
[fol. 103] A. Mr. Featherson, treasurer in charge of loans.

Q. What happened?

A. I submitted the $20,000 bonds for a loan and he rejected them. Their board of directors had ruled against that collateral in their bank.

Q. What did you then do?

A. I then called Mr. Peirson on the 'phone and told him the Real Estate Trust Company would not take the bonds as collateral.

Mr. Henderson: I ask that this testimony be striken from the record. I do not see it is at all material on the question of whether there was a repurchase agreement.

The Court: What is the purpose of this, Mr. Brown? Is it to show knowledge on the part of Mr. Peirson on which he based his tender of the bonds?

Mr. Brown: The letter of May 9th, 1920. It was the result of the information Mr. Peirson received from Mr. Lynch which caused him to write the letter of May 9th which has been offered in evidence.

The Court: How is that material? If these bonds were guaranteed in accordance with this testimony, he had a right to tender them. How is that right affected in any way by something that somebody told him when he tried to hypothecate the bonds?

Mr. Brown: Because there was nothing up to that time which would cause him to be suspicious as to the value of these bonds.

(Objection sustained. Motion to strike out allowed. Exception noted for plaintiff by direction of the Court.)

By Mr. Brown:

Q. Is Mr. Rierra employed in your office?

A. Yes, sir.

[fol. 104] Q. Did you, through Mr. Rierra, deliver these $20,000 Massachusetts Oil bonds to Leach & Company?

Mr. Henderson: Objected to, unless this man personally did it.

(Witness temporarily withdrawn.)

FRANCIS J. RIEKKA, JR., sworn and examined as follows:

Direct examination.

By Mr. Brown:

Q. By whom are you employed?
A. Mr. Lynch.
Q. How long have you been with him?
A. About sixteen years.
Q. Did you or did you not on May 10th under instructions from Mr. Lynch go to the office of Leach & Company on South Fourth Street?
A. I did.
Q. What did you have with you at that time?
A. I had 20,000 Massachusetts Oil Refining 7's.
Q. Who did you see?
A. I saw their cashier.
Q. Who is he?
A. I don't know him personally.
Q. What did you do?
A. I took the bonds down there and presented them and said I wanted a check for $15,000 to the order of Mr. Walter Peirson.
Q. What did he say to you?
A. He said, "All right, wait a minute," and he got the check and handed it to me, and he said, "Wait a minute, there is a note to be signed," and I said, "I didn't know anything about it"; and he handed me a note and he said, "There is three dollars in stamps to go on it," and I said, "I don't know anything about that"; so I took the note and the check and took it back and gave it to Mr. Lynch.

[fol. 105] EDWARD D. C. LYNCH recalled.

Direct examination.

By Mr. Brown:

Q. Did you or did you not have any conversation with a representative of A. B. Leach & Company on May 10th, 1921, in connection with the loan of $15,000 and the note of $15,000?

A. Yes.

Q. With whom?

A. Mr. Doebler.

Q. Who is Mr. Doebler?

A. Mr. Doebler is office manager of A. B. Leach & Company on South Fourth Street.

Q. Had you known Mr. Doebler for some time?

A. I had known Mr. Doebler on the street, just like I know a lot of other fellows connected with other banking houses, not that I know him intimately.

Q. I understand you to say Mr. Doebler was office manager of A. B. Leach & Company at that time?

A. Still is, I believe.

Q. What did you say to Mr. Doebler and what did he say to you in this connection?

Mr. Henderson: Objected to. I ask for an offer of proof.

(At side bar.)

Mr. Brown: I offer to prove by this witness that in May of 1921, at the request of Mr. Peirson he communicated with A. B. Leach & Company after the refusal of the Real Estate Trust Company to accept the Massachusetts bonds as collateral; that he communicated with Mr. Doebler whom he had known for some time as the office manager of A. B. Leach & Company in this city, that he advised Mr. Doebler that he was acting for Mr. Peirson and had endeavored to borrow money with the Massachusetts Oil 7's as collateral [fol. 106] but the bonds had been rejected by the Real Estate Title & Trust Company, and that he also advised Mr. Doebler that he endeavored to check the market on these bonds and found only a weak bid of fifty; that Mr. Doebler replied stating "Your broker is off in his quotation; our quotation is 94 bid, offered at 97½ and we are taking bonds from our private customers at 97½." That Mr. Lynch then reported his conversation with Mr. Doebler to Mr. Peirson, Sr.; that on May 10th, 1921, Mr. Peirson instructed the witness to deliver the bonds to A. B. Leach & Company and receive a check to his order for $15,000, and that he delivered the bonds to his representative and his representative then redelivered to him a check for $15,000 made by A. B. Leach & Company together with a note for $15,000 which has already been offered in evidence;

that this note was not signed at the time by Mr. Peirson and that Mr. Lynch sent it to Mr. Peirson with instructions it should be signed and returned to Leach & Company.

Mr. Henderson: Objected to as immaterial.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)

(Plaintiff rests.)

MOTION FOR NONSUIT

Mr. Henderson: I wish to make a motion for a nonsuit.

(Motion denied.)

[fol. 107] DEFENDANT'S EVIDENCE

CHARLES T. MATHER sworn and examined as follows:

Direct examination.

By Mr. Henderson:

Q. You are here under subpœna by us, are you?
A. I am.
Q. In 1920, by whom were you employed?
A. A. B. Leach & Company.
Q. By whom are you employed now?
A. I am in business for myself.
Q. During the period from the beginning of 1920 through July 17th, 1922, by whom were you employed?
A. A. B. Leach & Company.
Q. Do you know Mr. Peirson, the plaintiff in this case?
A. I do.
Q. Do you know his son?
A. I do.
Q. Mr. Peirson has testified that at the time you came in to see him prior to the 25th of May, 1920, you made an agreement with him that any securities that he bought from A. B. Leach & Company he could not lose on, that A. B. Leach & Company would stand back of them and take them off his hands at the price he paid for them. Did you or did you not make any such agreement?

A. I did not.

Q. At the time of the sale of the 10,000 Whitmer-Parsons bonds on May 25th, 1920, from whom did you receive that order?

A. Mr. Peirson, Jr.

Q. Had you or had you not up to that time ever met Mr. Peirson, Sr.?

A. I did not. I called on Mr. Peirson, Jr., and he told me [fol. 108] that he did not have any money at the moment, but his father did, and he suggested to have the firm write a letter which was done. He submitted it to the father and, of course, in a reasonable time he telephoned me that the father had decided to take 10,000 bonds, which was confirmed.

Q. Up to that time had you or had you not seen the father?

A. No, absolutely no.

Q. And you received the order for these 10,000 William Whitmer bonds through Mr. Peirson, Jr.?

A. Absolutely.

Q. Did you or did you not immediately after that order write a letter on the 25th of May to Mr. Peirson, Sr., and I show you a letter and ask you if that is your letter?

A. Yes. I had not known Mr. Peirson then.

Q. What is that letter?

A. Expressing my thanks for the order.

Q. Placed through whom?

A. Through the son.

Q. When did you meet Mr. Peirson?

A. Why shortly after that I went down and submitted the Massachusetts bonds to the son and he then presented me to the father. The son at that time had ordered some Massachusetts bonds but he had not bought the Whitmer bonds before.

Q. On September 20th, Mr. Peirson testified he bought $20,000 Massachusetts Oil bonds from you?

A. Yes, sir.

Q. Did you get an order from him for 20,000 bonds?

A. No.

Q. What did you get?

A. He gave me an order for 10,000. At least he said he would like to have 10,000 and inasmuch as he did not have

the cash I made the proposition to exchange other bonds [fol. 109] and so he said he had Liberty bonds and we arranged to allow him one per cent above the market on the Liberty bonds and he then replied if that could be carried out on 10,000 additional he would make it 20,000.

Q. From whom did you receive that authority to give him one per cent extra on the Liberty bonds?

A. The office.

Q. From whom?

A. Mr. Miller.

Q. Did you at the time of this transaction with reference to the Massachusetts Oil bonds make any agreement with Mr. Peirson with reference to repurchasing those bonds?

A. No, sir.

Q. Did you at that time tell him that A. B. Leach & Company would stand back of these bonds and he could not possibly lose anything on them?

A. No, sir.

Q. You never made any such statement?

A. No, never.

Q. In February, 1921, you took an order for 10,000 National Oil bonds?

A. Yes.

Q. From whom did you receive that order?

A. Mr. Peirson, Sr.

Q. And at that time did you make any agreement with him to repurchase those bonds at any time at the price he paid for them?

A. No, sir.

Q. Did you tell him that A. B. Leach & Company would stand back of these bonds and that he could not possibly lose anything on them?

A. No, sir. Mr. Peirson has never talked to me or seen me personally regarding such an agreement.

Q. And you never had any such an agreement?

A. No.

[fol. 110] Q. What was the extent of your agency with A. B. Leach & Company?

Mr. Brown: Objected to. It hardly lies in the mouth of the agent to define his authority.

The Court: He can testify as to what authority was given him by the defendant.

(Objection overruled. Exception noted for plaintiff by direction of the Court.)

By Mr. Henderson:

Q. What was the extent of your agency?

The Court: Now, that is asking him to draw a conclusion. If he had any authority as an agent he must have gotten it from somebody and he can state what instructions were given him as to his authority. The extent of his agency would call for a conclusion.

By Mr. Henderson:

Q. You understand what his Honor has instructed. Now, answer.

A. Why submitting offerings and taking orders.

Q. You were authorized to go out and submit offers?

A. Absolutely, yes.

Q. What do you mean by that?

A. To submit bonds. The bond is described in the circular. We are given circulars to go out and we get the men interested and we book his order, if we get it, and if the bonds are not sold before we return the order is confirmed.

Q. In whom is the power vested as to whether the order is confirmed or not?

A. In the office.

Q. And by that you mean who?

A. Mr. Miller or Mr. Doebler.

Q. Did you or did you not have any authority to confirm orders yourself?

[fol. 111] A. No, I did not.

Q. Your duties, then, as I understand, consisted of receiving circulars from A. B. Leach & Company. Is that correct?

A. Yes.

Q. And what securities they had to sell you were authorized to go out and take orders for?

A. Yes.

Q. And these orders after you received them, were subject to their confirmation?

A. Yes, sir.

Q. After your getting orders for these various securities from Mr. Peirson, did he at any time speak to you with reference to this repurchase agreement?

A. No, sir, I knew nothing about it until that third letter when Mr. Miller asked me.

Q. You mean the letter of April 21st, 1922?

A. I am not familiar with the date.

Q. The letter when he called Mr. Peirson on the 'phone?

A. The letter was submitted to the office. I never saw the letter myself but I am familiar with the contents, and I then got to the telephone to get Mr. Peirson's office and they told me he was at Radnor and I reported the same to Mr. Miller.

Q. Is that about the time Mr. Peirson was going to California?

A. Exactly.

Q. And that is the first intimation you had with reference to this repurchase agreement?

A. Yes.

Q. Up to that time Mr. Peirson had never said anything to you about it?

A. No.

Q. Mr. Peirson testified this morning that on or about the 10th of May, 1921, there was a conversation with reference to his being unable to secure a loan on these Massa- [fol. 112] chusetts Oil bonds and at that time he asked you to carry out this repurchase agreement?

A. No, nothing was said about it.

Q. Did you ever have any such conversation with him?

A. I had the conversation regarding the bonds for a loan.

Q. Tell us what that conversation was?

A. He called up and he said they would not make a loan on the 20,000 Massachusetts Oil bonds, and I replied that it was ridiculous, and I said wait, probably Leach & Company will make a loan. In any event I asked Mr. Miller and he told me to report that he would loan $15,000 and I reported to Mr. Peirson and he said O. K., all right.

Q. At that time nothing was said to you about repurchasing?

A. No.

Q. Did you ever at any time speak to Mr. Peirson about the price of Massachusetts Oil?

A. Well at one time I went to him and submitted something else. I think that is the time he expected $38,000 from the sale of some real estate belonging to Mrs. Peirson, and I told him Massachusetts was then selling at 100 and whether he wanted to take his profits and he said no, and when he bought the bonds he wrote to Boston to the bank who had bought securities, and I asked him whether he got their reply and he said, oh, yes, everything was satisfactory and he would keep the bonds after they had shown a profit of two points.

Q. That is $20 on a bond?

A. Yes.

Q. After this loan was made the 11th of May, 1921, did you ever take up with Mr. Peirson the question of payment of that loan?

A. No. Now, wait a minute. I called at the office and the last time I saw Mr. Walter Peirson, Jr.

(fol. 113) Q. Did you ever try to interest Mr. Peirson, Sr., in any securities after May of 1921, in the purchase of securities?

A. Yes.

Q. What was the conversation?

A. He told me then that he didn't want to buy any more securities until he had paid this loan off.

Q. Did you ever have any conversation with Mr. Peirson with reference to this loan when he told you that he would not take the loan up at that time and preferred to have it stand?

A. Not to my knowledge, no.

Q. Did you ever know or have any knowledge of this letter of May 9th, 1921?

A. No.

Q. You never saw that letter?

A. No, I never saw the other one either.

Q. And this letter of April 21st, 1922, did you ever see that letter?

A. No, sir.

Q. Now, get that date in your mind?

A. No, this is not the last. No, I never saw it.

Q. At both of these times you were in Leach & Company's employ?

A. Yes.

Q. Now, April 21st, 1922, Mr. Peirson testified that Mr. Miller called him on the telephone with reference to receiving a letter from him and you denied that you ever made such an agreement with him?

A. Yes.

Q. Do you recall at about that date any conversation Mr. Miller had over the telephone with Mr. Peirson about this repurchase agreement?

A. When that letter came in, the last letter, April 21st, 1922, Mr. Miller came to me, although I had never seen the letter and I am familiar with the contents, and he asked me [fol. 114] whether I had any such agreement with Mr. Peirson and I said no, and so he says we will get him on the telephone, and I calls up his office and they told me he was in Radnor getting ready to go abroad or something.

Mr. Brown: I move that the answer be stricken from the record as hearsay.

Mr. Henderson: I have no objection.

By Mr. Henderson:

Q. Then as a result of that was Mr. Peirson reached at his home in Radnor by Mr. Miller?

A. Yes.

Q. Did Mr. Miller talk over the telephone with Mr. Peirson?

A. He did.

Q. Where were you?

A. In the office, but he went in the closed booth.

Q. Did you hear that conversation?

A. No, but Mr. Peirson was on the line.

Cross-examination.

By Mr. Brown:

Q. How long have you been in the bond business?

A. Fifteen years.

Q. And all your time here in Philadelphia?

A. Yes.

Q. How long were you with A. B. Leach & Company?

A. Eight years.

Q. And during that time you, I understand, were regarded as one of their star salesmen?

A. Not necessarily, no.

Q. But you had a reputation of being probably one of the best of their salesmen, didn't you?

A. Not necessarily.

Q. Well, were there any that sold more than you did?

[fol. 115] A. Oh, yes.

Q. I suppose Mr. Miller as manager of the office probably, but anybody else except Mr. Miller?

A. I don't remember. I never saw the records of the different salesmen.

Q. But you were very successful anyhow?

A. Oh, yes.

Q. These issues that you sold to Mr. Pearson of the Massachusetts Oil, for instance, that was really a Leach Company undertaking, wasn't it?

A. Well, it was submitted to us as a Leach offering. I, of course know nothing about that.

Q. But you were a branch here of the Leach main office over in New York, weren't you?

A. Oh, yes.

Q. And the Leach office in New York, Colonel Leach, I understand is the head of the firm, isn't he?

A. I believe so.

Q. And the Massachusetts Oil was a Leach undertaking, was it not?

A. Of course I don't know as a salesman, only that they submitted the offer to us.

Q. You knew that this was a Leach undertaking and that Leach was largely interested in it?

A. Well, I imagine he is interested in all issues that come out to a large extent.

Q. And the same thing in regard to National Oil?

A. Probably, yes.

Q. And the other?

A. Whitmer, yes.

Q. How long had you been calling on Mitchell & Pearson before you met Mr. Pearson, Sr.?

A. I should say a couple of years. I am not familiar with the dates.

Q. I understand you had been calling at Mitchell & Peirson's two or three years before you met Mr. Peirson, Sr.? [fol. 116] A. Yes.

Q. The son was in the office with his father?

A. Yes.

Q. And they had a general office where they sat together?

A. Well, they couldn't see each other from the offices. They were on the same floor.

Q. And do I understand you to say that you obtained an order from the father without having met the father?

A. Through the son, yes. That is the reason I wrote him the letter.

Q. You did not then meet the father through the son and have a talk with him before you sold him these Massachusetts Oil bonds, did you? -

A. I met him before I sold him the Massachusetts Oil.

Q. I mean the Whitmer bonds.

A. No.

Q. Never met him at that time?

A. No.

Q. You did meet him shortly after that?

A. Yes.

Q. And you saw him frequently, trying to sell him bonds?

A. Well, he was a good buyer.

Q. And you did everything within your power to interest him in these securities?

A. Yes.

Q. And I suppose you were not overly modest in stating the virtues of, for instance, Massachusetts Oil proposition, were you? You tried to make it as glowing as possible?

A. Well, such as was shown on the circulars.

Q. Do you limit yourself to the circular?

A. Oh, yes, we have to do that.

Q. You have had large experience in the sale of securities. [fol. 117] Is it your experience that bond men ordinarily limit themselves to the printed circular selling their goods?

A. Oh, yes. There is where you get your knowledge.

Q. You never go outside of the circular?

A. No.

Q. I understand you to say you have not discussed with Mr. Peirson the subject of repurchase of these bonds?

A. No, Mr. Peirson has never seen me nor come to talk to me about it.

Q. You were familiar with the Leach business from time to time, what was going on with your customers?

A. No, except the orders that I brought in.

Q. You regarded Mr. Peirson as your customer?

A. Yes.

Q. And in the Leach office he was regarded as the customer of Mr. Mather?

A. Yes, he should have been if he was not. I believe he was.

Q. Didn't you confer with Mr. Miller from time to time about the sales you were making to Mr. Peirson?

A. Oh, no.

Q. Never conferred with Mr. Miller at all about them?

A. No.

Q. Just made these sales on your own account and never consulted Mr. Miller about it?

A. I have a certain list to go by. I couldn't report I was going to call on this man in the next five minutes and later call him and tell him everything I did.

Q. How did Mr. Peirson impress you all the time you knew him?

[fol. 118] A. All right.

Q. What do you think would prompt Mr. Peirson in writing a letter of the kind that was written to your company on May 9th, 1921?

Mr. Henderson: Objected to.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)

By Mr. Brown:

Q. I understand you to say that you never saw this letter of May 9th, 1921?

A. No, sir.

Q. But on May 10th, the day after this letter is dated, I understand you to say that Mr. Peirson called you on the 'phone?

A. I didn't say so.

Q. Didn't you say so?

A. No.

Q. Then did you call Mr. Peirson on the 'phone?

A. No.

Q. Well, what communication did you have with Mr. Peirson on May 10th?

A. None to my knowledge.

Q. Why didn't you just say that you spoke to him on the 'phone and he wanted to get a loan of $15,000?

A. Oh, if that was the date, yes. He called me on the 'phone regarding the loan.

Q. You say he called you on May 10th?

A. He did.

Q. What did you tell him about these Massachusetts bonds?

A. He said he wanted some money, I understood him to say to go abroad.

Q. Didn't say anything about the market being bad and he couldn't borrow any money on them?

A. Oh, yes.

(fol. 119) Q. Said they were not good collateral, didn't he?

A. Yes, that the bank had refused to loan him anything on these bonds which I, of course, told him was ridiculous.

Q. And did he talk to you at that time about the market value of these bonds?

A. Nothing at all.

Q. Did he tell you they were only being quoted at 50 on the street?

A. No. I don't know that.

Q. He at that time told you he couldn't get a loan on these because they were down in value and were only quoted at 50 where he had paid 98?

A. No, sir. Not a word said about that.

Q. How many customers did you have at that time? Approximately a hundred?

A. Why, that is hard to answer. Customers all told that I had really sold to in my life?

Q. No, in May, 1921, did you have a hundred?

A. Oh, yes, 150.

Q. How many of them borrowed from A. B. Leach & Company?

A. None of them.

Q. This was the only case, was it?

A. Yes, sir.

Q. Where your customer or any customer that you had while with A. B. Leach & Company borrowed money from them?

A. Yes, sir.

Q. And it is the only time that Leach & Company ever loaned any of your customers money?

A. Yes.

Q. Didn't it strike you as a little bit unusual for Leach & Company to loan 85/100ths on 80/100ths security of these bonds?

A. No, because they had done it with the customers of other salesmen but not with mine.

[fol. 129] Q. Does Leach & Company loan money to persons who buy their bonds on that collateral?

A. Oh, yes, they do that.

Q. How much of that kind of business do they do, or did they do in April or May of 1921?

A. I don't know. I never saw the books.

Q. This was the only loan they made to a customer of yours, is that it?

A. Absolutely the only one.

Q. Coming down to this letter of April 21st, 1922, I understand you to say you never saw that letter, is that correct?

A. I didn't see any of the letters at all.

Q. Who did see the letters?

A. Mr. Miller, I imagine. They came into the room but he never showed it to me.

Q. He never showed you any letters from your customers?

A. Not about the loan, no.

Q. I am not talking about the loan. I am talking about the demand of Mr. Peirson to take the bonds back.

A. I know. I never saw any of these letters but I am familiar with the contents of the letter at the time Mr. Miller was talking to him over the 'phone at Radnor.

Q. Do I understand you to say that Mr. Miller did not show you this letter of April 21st, written by Mr. Peirson about these bonds that you sold him?

A. No, he did not.

Q. You never saw it?

A. Absolutely not.

Q. And you never saw the first letter?

A. No.

Q. So that whether this letter had been received or not the fact that you did not see it would not have been unusual?

[fol. 121] A. No, not necessarily. I didn't see it.

Q. You know, didn't you, that Mr. Peirson made the statement that when you sold him these bonds that you had agreed to take them back at any time?

A. Only from that last letter when he made such a statement.

Q. Well, that is the letter of April 21st?

A. Well, that is the only one. Mr. Miller came and asked me whether such an arrangement had been made, to which I replied no.

Q. And after you read Mr. Peirson's letter you told him you never made any such arrangement?

A. No. He was going abroad.

Q. Where did you get that information?

A. Or going to California.

Q. Well, he was only there about four weeks, wasn't he?

A. Well, then, I cannot see why Mr. Peirson did not get in touch with me.

Q. Well, when you for the first time, as you say, heard about the demand of Mr. Peirson, did you get in touch with Mr. Peirson and tell him he was mistaken?

A. I did not.

Q. You never communicated with him in any way?

A. No, I did not. Why didn't he come to me. He claimed that I made such an agreement.

Q. Do you know when the Whitmer Company went into the hands of the receivers?

A. No, I don't exactly know the date.

Q. When this loan was made in May of 1923 the Massachusetts had approached close to receivership at that time, had it not?

A. Not to my knowledge. I sold the bonds to my aunt and the whole family.

Q. Well, these bonds were quoted quite low on the street, weren't they?

[fol. 122] A. We don't know that. Salesmen on the street cannot find that out.

Q. There is always a market?

A. Always a market.

Q. Was there any value on Massachusetts bonds at that time?

A. I certainly hope so.

Q. What was it?

A. I don't know. It is not in my power. I was a salesman.

Q. And you were given a price to sell these bonds, whether it was the market price or not, is that so?

A. We had to go by that price, yes.

CHARLES R. MILLER, sworn and examined as follows:

Direct examination.

By Mr. Henderson:

Q. What is your connection with A. B. Leach & Company, the defendant?

A. Vice-president.

Q. How long have you been in that capacity?

A. Since about the first of the year, 1918.

Q. How long have you been connected with A. B. Leach & Company?

A. Twenty years last October.

Q. How long have you been in charge of their Philadelphia office?

A. About seventeen years.

Q. Mr. Mather was in your employ?

A. He was.

Q. During the period from May, 1920, through to July 17th, 1922, what was the scope and extent of Mr. Mather's authority?

[fol. 123] A. To solicit orders subject to our acceptance and confirmation.

Q. Just exactly what do you mean by that?

A. By that I mean we had different offerings of securities, most of which we had circulars on, and those circulars were given to our salesmen with which to solicit business and when they received an order they had to take that order subject to our confirmation, because we had a number of

salesmen out at that time and if the bonds should be sold before Mr. Mather should bring in an order of course we couldn't confirm that order where the bonds had been previously sold.

Q. Did you or not ever authorize Mr. Mather to make any such agreement as Mr. Peirson claims to repurchase at any time at cost any and all securities purchased by Mr. Peirson from your company?

A. I did not.

Q. After an order is received from a salesman such as Mr. Mather, and in the specific case of Mr. Peirson's order, what is the system in your office with reference to such an order?

A. Well, we first ascertain to see if we have the bonds available and if we have, a letter of confirmation is sent to the party who gives him the order, from which a sales ticket is prepared and goes to our cashier's department who prepares for the delivery of the bonds to the party who gives us the order.

Q. How does the salesman turn in his customer's money to your company?

A. You mean how does he turn in his order?

Q. How does he turn in his orders?

A. Sometimes he will do it verbally over the telephone and sometimes he will do it in writing.

Q. Then are any order tickets made up in your office?

A. Oh, yes. Just as soon as we know that we can control 1241 firm the order that we receive, why then a sales ticket is prepared which goes to the cashier's department which is automatic instructions to him to prepare for the delivery of the bonds.

Q. Did you or your company, prior to March 1, 1921, make any agreement with Mr. Peirson to repurchase from him any of the securities that he bought from you?

A. We certainly did not.

Q. Did Mr. Mather, as a salesman, have any authority other than those which you have spoken of?

A. He did not.

Q. And those were limited to taking orders and submitting them to you for confirmation?

A. They were.

Q. Who would select for Mr. Mather the securities which he was to offer for sale for you?

A. I usually did that.

Q. Yourself?

A. Yes.

Q. And in submitting those securities to customers for purchase what was his authority with reference to statement to be made in connection with the securities in question?

A. Why, to confine his statement to facts contained in the circular and other sales data that were prepared. Sometimes a bond circular is rather voluminous for the purpose of the bond buyer to read fully and in order to give the bond buyer the high spots that are contained in the circular frequently there is additional information that is given to him.

Q. I show you a copy of letter of May 9th, 1921, and ask you whether the original of that letter was ever received at your office, as far as you know?

A. It was not.

Q. When did you first see that copy yourself?

[fol. 125] A. At the last trial.

Q. What is your system of incoming mail, or what was it at that time, May, 1921?

A. Our incoming mail is either opened by our Mr. Doolittle, who is assistant treasurer or our cashier Mr. McKeag, and it is distributed to the various departments.

Q. You never saw that letter until the last trial of this case?

A. I did not.

Q. Do you recall Mr. Pearson requesting, through Mr. Mather a loan on these 20,000 Massachusetts 6% bonds?

A. Yes.

Q. And a loan was arranged, was it not?

A. It was. When Mather told me that the 20,000 Massachusetts Refunding bonds had been rejected by the trust company, I said we would loan Mr. Pearson $15,000 on these bonds.

Q. Mr. Brown has stated in a question here a little while ago that the bonds at that time were worth about fifty. At what price were the bonds being sold at that time?

A. At ninety-eight, and we can show records to that effect if we are given ample time.

Q. At the time that this loan was requested of you were the 20,000 Massachusetts Oil bonds brought to your office?

A. They were.

Q. And you were requested to give a check for $15,000?

A. Which was refused because the note did not accompany the bonds.

Q. What did you insist on before giving the loan?

A. I insisted on Mr. Peirson's note for $15,000 before we loaned him that amount of money.

[fol. 126] Q. And is this the note you received from him?

A. It is.

Q. I show you a check dated May 11, 1921, and ask you whether that is the check for $15,000 represented in the loan to Mr. Peirson?

A. It is.

Q. I show you a check of July 19, 1921, for $700 and ask you what that is?

A. That is six months interest at 7 per cent. on $20,000 Massachusetts Refining bonds.

Q. And to whom is the check payable?

A. The check is payable to Mr. Walter Peirson, Sr., and has the endorsement of Mr. Walter Peirson, Sr.

Q. I show you a check of January 4, 1922, for $29.17, and a letter of January 4, 1922, and ask you what they are?

A. This check is the difference in interest due Mr. Peirson on 20,000 Massachusetts Refining bonds. I should say this is six months' interest after deducting our interest charges on Mr. Peirson's loan.

Q. And that $29.17 represented the overlap from the eleventh day of May to the first day of January, 1922, on the loan. In other words that was a credit of $29.17 due Mr. Peirson?

A. Yes, the letters show the dates.

Q. The letters specifically state the fact?

A. Yes, and the check is made payable to Mr. Walter Peirson and has his endorsement.

Q. Now, up to that time had you ever heard anything about this repurchase agreement?

A. No.

Q. Had you ever received any letters from Mr. Peirson?

A. No.

Q. Had he ever been in your office and discussed this matter with you?

[fol. 127] A. No.

Q. Did he ever call you on the telephone?

A. No.

Q. Your office was always in Philadelphia at the same during the whole period, was it not?

A. Always.

Q. In the vicinity of Fourth and Chestnut in the city of Philadelphia?

A. Yes.

Q. When did this repurchase agreement first come to your notice?

A. When I received Mr. Peirson's letter of April 21st, 1922.

Q. Is that the letter you refer to?

A. It is.

Q. When you first received that letter what did you do?

A. I asked Mr. Mather if he ever made such an agreement to which he replied he did not, and then I asked Mr. Mather to call Mr. Peirson on the telephone so that I could arrange to have an interview with him.

Q. Did you call Mr. Peirson on the telephone?

A. Mr. Mather tried to get Mr. Peirson on the telephone at his office.

Q. Did you get Mr. Peirson?

A. Yes, I spoke to Mr. Peirson, I think at his home.

Q. You got Mr. Peirson on the telephone where?

A. At his home.

Q. And what was the conversation?

A. I told Mr. Peirson that we had received this letter and that Mr. Mather had denied making such an agreement. I also told him that Mr. Mather had no authority to make such an agreement and that I wanted to have an interview and discuss the matter with him. He told me then that he was leaving for California in an hour. I should say in be-

[fol. 128] tween there that he also said that he would make Mr. Mather admit that he made such an agreement on the witness stand.

Q. When he told you he was going to leave for California in an hour what further conversation was there at that time, if any?

A. There wasn't any that I can recall.

Q. All the conversation was that you had received this letter and denied making any such agreement?

A. Right.

Q. And then you asked for an interview?

A. Right.

Q. And Mr. Peirson stated that he was leaving for California in an hour?

A. Right and he said, if I recall, that I hung the telephone up.

Q. Now, did you reply to that letter?

A. What was the use of replying to that letter when he was leaving.

By the Court:

Q. He simply asked you if you did reply?

A. I did, over the telephone, yes.

By Mr. Henderson:

Q. Did you make any written reply to that letter?

A. No, what was the sense in doing it?

Q. Why didn't you reply?

A. Because Mr. Peirson told me he was leaving for California in an hour.

Q. And did he say how long he was going to be gone?

A. I think he said four weeks.

Q. That letter then, which was received by you on the twenty first day of April, was the first intimation you or your company had of this repurchase agreement?

A. It was.

(fol 124) Q. And you immediately called him on the telephone?

A. I did.

Q. How old is A. B. Leach & Company?

A. I think we have been in business thirty six years.

Q. During the period when this suit was involved, what was the actual amount of business done by your company, particularly in the sale of bonds?

A. All of our offices, approximately one hundred to one hundred and fifty millions annually. That is gross turnover.

Q. How many offices do you have?

A. Well, I would have to count them up from one of our circulars. We maybe have ten or twelve or fifteen offices.

Q. Have you or have you not had any similar suits upon any such repurchase agreements?

A. We have not.

Mr. Brown: That is objected to, and I move that the answer be stricken out.

The Court: Strike out the answer.

By Mr. Henderson:

Q. After Mr. Pearson came back from California what next happened?

A. He came in our office. I think he had his son with him but I am not sure about that, and he handed me the letter addressed. If you will show it to me I can tell the date.

Q. You mean the letter of July 17, 1922?

A. He handed me this letter of July 17, 1922, which makes a pretense at tendering the bonds.

Mr. Brown: I move that the answer be stricken out.

Mr. Henderson: I agree that it be stricken out.

(fol. 120) By Mr. Henderson:

Q. Who handed you that letter?

A. Mr. Pearson.

Q. Did he hand you any bonds with it?

A. I do not recall.

Q. This is where he made the tender, as he claims?

A. Yes. That was the letter that was supposed to be the tender.

Q. But at any time prior to April 21, 1922, did you have any knowledge with reference to any repurchase agreement?

A. I did not, and if I had I would have done the same thing as I did when I received Mr. Pearson's letter of April 21st, 1922.

Cross-examination

By Mr. Brown:

Q. Mr. Mather was one of your star salesman wasn't he?

A. He was a good salesman.

Q. Almost the best you had, wasn't he?

A. Well, I don't know that there would be any objection to admitting that. I say he was a good salesman.

Q. And he had customers who were known as his customers, didn't he?

A. He did.

Q. And he was particularly careful to see that they were well supplied with Leach bonds from time to time, I suppose?

A. He did.

Q. And among his customers was Mr. Peirson?

A. He was.

Q. Now, you have mentioned this note transaction and as I understand you, you were very anxious to see before you gave your check for $15,000 that the note was signed by Mr. Peirson?

(3d Ed.) A. Certainly. I wouldn't have loaned him the money if he hadn't done it.

Q. Now, do I understand you to say that you did not give up the check until you got Mr. Peirson's signed note?

A. I did not, and we will prove that with our cashier right here, and furthermore we will prove that the gentleman that made the statements that these bonds were delivered to us — or I should say our check.

The Court. Now, just a moment. We cannot have you stating what someone else will prove.

By Mr. Brown:

Q. Now, you are just as certain as that check for $15,000 did not go out of your possession until that note was signed, are you, as you are of the other part of your testimony?

A. I am.

Q. That is a very definite answer?

A. It is.

Q. What was the market value of the Massachusetts Oil bonds in April of 1922?

A. April, 1922, we sold bonds.

Q. Well, I want to know the value.

A. We sold bonds at 98 after April 21st of 1922.

Q. And what was the value in June of 1922?

A. I do not recall that.

Q. Had it changed much?

A. That I do not recall.

Q. Now, you have given us the benefit of your judgment of the values in April, 1922. Take May of 1922. What were those Massachusetts bonds worth?

A. I think we sold bonds at 98 in May of 1922, but we can produce our records, I think, to substantiate that.

Q. How about June of 1922?

[fol. 132] A. I do not recall.

Q. Was the same market, about 98?

A. I do not recall.

Q. Well, would you say the market had changed materially?

A. Well, I would say it had not changed very materially.

Q. From 98?

A. Yes.

Q. How about July of 1922?

A. Well, I don't recall that.

Q. No material change in the market?

A. I say I do not recall that.

Q. Well, would you say there was any material difference between June of 1922 and July of 1922 in the market value of the Massachusetts Oil bonds?

A. There may have been.

Q. Well, if there was how much was the change?

A. I don't recall.

Q. Weren't they approximately worth between 90 and 98, according to your testimony?

A. I said that we sold the bonds at 98 immediately following April 21, 1922. I say also that I do not recall what the market was in May.

Q. But you just said it had not materially changed in May and June?

A. I think it did not materially change.

Q. How about July?

A. I say I do not know.

Q. Let me ask you this. If there was no material change in June and the market was practically the same in July, 1922, and Mr. Peirson made this demand on you which you denied, why didn't you sell the bonds that were up with this note as collateral and get your $15,000?

A. For the reason that we had some of these bonds on [fol. 133] hand of our own which we preferred to sell, naturally.

Q. Let me ask you again, why was it when Mr. Peirson in July of 1922 refused to pay you and made a tender of these bonds, why was it you did not sell that $20,000 of Massachusetts Oil against that note?

A. For the reason it was not a readily marketable bond.

Q. And wasn't it because of the fact that the market was only 40 to 50 on that bond?

A. I don't know that.

Q. Well, would you say that it was not?

A. Well, we can produce records to show.

Q. I am asking you that. Will you say that the market was not 40 to 50 in July of 1922?

A. I wouldn't say what it was because I don't know.

Q. Then I ask you why you did not sell that collateral and why have you waited until this time holding these bonds?

A. We had bonds of our own to sell.

Q. Then your answer is that because you had bonds of your own to sell you did not sell the 20,000 of Massachusetts Oil which you held for collateral security for this note. Is that your reply?

A. Why, yes.

Redirect examination.

By Mr. Henderson:

Q. Was there any obligation upon you under that note to sell these bonds?

A. No.

Q. You don't know what they were worth after April of 1922, do you?

A. No, not positively but the quotation sheets will undoubtedly show.

Q. But you don't know yourself?

A. No.

[fol. 134] Recross-examination.

By Mr. Brown:

Q. You were selling your bonds, you just said, and you have given us as your reason for not having sold the bonds which you had as collateral for this note that you were selling other bonds of the Massachusetts Oil & Refining Company after July of 1922?

A. I am not certain we sold any bonds after July, 1922. I say we sold bonds after April 21st, 1922, at 98.

Q. I understood you to say that the reason you did not sell these bonds, these 20,000 Massachusetts bonds in July of 1922 was because you were selling other bonds of the Massachusetts Oil?

A. Because we had bonds on hand of our own, yes, and why should we sell Mr. Person's when we had bonds of our own, and we had his note for $15,000.

Q. And you were willing to sell these other Massachusetts bonds at that time after the note fell due?

A. Not necessarily at that time, no, but I say that the reason why we had Mr. Person's bonds on hand was because we had other bonds of the same issue of our own.

Q. And you were selling them?

A. After April of 1922 at 98.

Q. And what did you sell them at in July?

A. I am not sure about that.

Q. Am I to understand you did not sell any bonds after June of 1922, Massachusetts Oil bonds?

A. I wouldn't say. Our records will show.

Q. I will ask you to produce your records tomorrow morning if you will, that will tell us what bonds you sold, Massachusetts Oil bonds, after July of 1922.

A. No, I said after April of 1922.

Mr. Henderson: We will object because it is after July.

[fol. 135] Redirect examination.

By Mr. Henderson:

Q. Did Mr. Person ever ask you to sell out the security?

A. In this letter he did.

Q. Is that the letter of April 21st? Just read it over.

A. No, he did not.

Q. There was no obligation on you to sell out?
A. No.

By Mr. Brown:

Q. You had the right to sell this collateral at any time? Didn't you have the right to sell that collateral at any time under that note?

The Court: The note is there and will speak for itself.

Mr. Henderson: I wish to offer in evidence check dated May 11, 1921.

"Defendant's Exhibit No. 1"

"A. B. Leach & Company, Inc., Investment Securities

No. 5315. May 11, 1921

Pay to the order of Walter Peirson $15,000, dollars, the sum of $15,000 and 00 cts.

A. B. Leach & Co. Inc. McKeag

To the Corn Exchange National Bank, Philadelphia, 3-18

(On back:) Pay to the order of Land Title & Trust Co. For Deposit to the Credit of Walter Peirson.

(Stamped:) Received Payment. The Land Title and Trust Co. May 12, 1921. Through the Clearing House."

Also offer in evidence check dated January 4, 1922.

[fol. 130] "Defendant's Exhibit No. 2"

"A. B. Leach & Company, Inc., Investment Securities

No. 6823 Philadelphia, Jan. 4, 1922.

Pay to the order of Walter Peirson, Sr., $29.17, dollars, the sum of $29 and 17 cts.

A. B. Leach & Co. Inc. McKeag

To the Corn Exchange National Bank, Philadelphia, 3-18

(On back:) Pay to the order of Land Title & Trust Company, Philadelphia. Walter Peirson.

(Stamped:) Received Payment. The Land Title and Trust Co. Jan. 7, 1922. Through the Clearing House."

I also offer in evidence check dated July 19, 1921.

"Defendant's Exhibit No. 3"

"A. B. Leach & Company, Inc., Investment Securities

No. 5693 July 19, 1921

Pay to the order of Walter Peirson, Sr., $700, dollars, the sum of $700 and 00 cts.

A. B. Leach & Company, Inc. McKeag

To the Corn Exchange National Bank, Philadelphia, 3-18

(On back:) Pay to the order of Land Title & Trust Company, Philadelphia. Walter Peirson.

(Stamped:) Received payment. The Land Title and Trust Co. Jul. 21, 1921. Through the Clearing House."

I also offer in evidence copy of letter dated January 4th, 1922.

"Defendant's Exhibit No. 4"

[fol. 137] "Mr. Walter Peirson, Sr., 30th & Reed Sts. Philadelphia, Pa.

Dear Sir: Enclosed please find our check for $2917, which still leaves a loan of $15,000 dated January 1st, 1922.

Trusting this is the way you wanted this item to be handled, we remain,

Very truly yours, A. B. Leach & Co., Inc., Cashier.

McK B."

I also offer in evidence letter of July 17, 1922, which has been previously offered as Plaintiff's Exhibit No. 20.

I also offer in evidence envelope indentified by the office man of Mr. Peirson, this morning.

(Marked "Defendant's Exhibit No. 7.")

I also offer in evidence letter of April 20, 1922.

"DEFENDANT'S EXHIBIT No. 5"

"Mr. Walter Peirson, Sr., 36th & Reed Streets, Philadelphia.

DEAR SIR: Price, Waterhouse & Company have recently audited our books and have reported to our New York office that we loaned you $15,000 on $20,000 par value Massachusetts Oil Refining Company 7% bonds.

You will no doubt recall we made this loan May 11, 1921, about a year ago, and at the time we understood it was to be for only a short period. Later you advised us you would take it up upon your return from abroad last fall.

As we do not make a business of loaning money and only did this as an accommodation to you, our New York office [fol. 138] have instructed us to request you to pay it. Will you therefore please comply with their request, and oblige

Yours very truly, —— ——.

CRM-L."

(Adjourned to 10 o'clock a. m., February 19, 1925.)

Trial resumed. February 19, 1925.
Present as before noted.

CHARLES R. MILLER recalled.

Direct examination:

By Mr. Henderson:

Q. Last night when we were closing, Mr. Brown had been discussing with you the price of these Massachusetts Oil bonds at certain times and he asked you that you bring your records with reference to these prices. Do you have those records with you with reference to any sales after May, 1921, and prior to July, 1922?

A. I have.

Q. What were the sales prices of these Massachusetts Oil bonds in or about the month of May, 1921?

A. Ninety-eight.

Q. Were any sales made at that time and on what date?

A. May 13, 1,200; May 19, 2,000; May 20, 2,000.

By Mr. Brown:

Q. That is $2,000 of bonds?
A. $2,000 face value. May 21st, $500.
Q. These are all 1922?

[fol. 139] A. No, 1921.

Mr. Brown: Well, I didn't ask for that.
Mr. Henderson: I asked the question.

By Mr. Henderson:

Q. Now, in the month of May, 1921, the dates which you have given represent the sales at that time by your company of these Massachusetts Oil bonds?
A. They do.
Q. And at a price of 98?
A. They do.
Q. And in the month of April, 1922, do you have your record of sales at that time?
A. I have not.
Q. Were there or were there not any sales at that time by your company?
A. I don't recall. I think there were not.
Q. Have you those records to show that?
A. Those records are on the table.

(Papers handed witness.)

There was a sale of $4,000 on May 31, 1922.
Q. At what price?
A. At 45, and on April 24th, 1922, a sale of $9,000 at 50. That is 50 per cent and the other is 45 per cent.
Q. Now, in answering Mr. Brown yesterday you said the bonds were selling in April, 1922, at approximately 98. Was that or not correct?
A. That was not correct. I was confused in my years. In other words my testimony was as of 1921 instead of 1922. In other words, I was speaking of sales that took place after we loaned Mr. Peirson the money and I was confused in my dates by having before me Mr. Peirson's letter of April 21st, 1922.

Q. And the letter you intended to refer to was the letter of May 9, 1921?

A. No, I am referring to the note. What I referred to [fol. 140] was the sales of these bonds after Mr. Peirson had signed the note.

Q. And therefore at the time he signed the note the sales were in the neighborhood of 98. Is that correct?

A. Yes, sir. We have actual transactions here from the time he signed the note, from May 13th to September 23d at 98.

Q. What were the maturity dates of these three issues?

A. Massachusetts Refining bonds, October 1st, 1929. The National Oil, May, 1924, and the Whitmer-Parsons, September 1, 1925.

Q. The note of $15,000 with interest from January 1, 1922, still remains unpaid and owing to your company by Mr. Peirson, does it not?

A. It does.

Cross-examination.

By Mr. Brown:

Q. The Massachusetts Oil bonds were not listed, were they?

A. They were not.

Q. And the market on those bonds had a wide variance, didn't it?

A. Somewhat, yes.

Q. The quotations?

A. Yes.

Q. Something like 50 bid and offered at 98?

A. Oh, no.

Q. How wide was the variance?

A. It might range about ten points approximately.

Q. And Leach & Company in 1921 practically controlled the market in these bonds, didn't they?

A. I wouldn't say so entirely, because there were several [fol. 141] New England houses interested in this transaction. As a matter of fact the First National Bank of Boston.

By the Court:

Q. When you speak of ten points just explain to the jury what that means? It means ten dollars on a hundred, doesn't it?

A. No, it means the bonds might be quoted at 88 and offered at 98.

Q. That is $10 on the hundred?

A. Yes.

By Mr. Brown:

Q. Confining yourself to the Philadelphia market these bonds were largely being sold on this market by Leach & Company?

A. Yes.

Q. And you were selling them, of course, at the highest price that you could get for them, weren't you?

A. Right.

Q. What caused the drop in those securities between May 13, 1921, and May 31, 1922?

A. The Massachusetts Refining Company.

The Court: Do you think we need to go into that?

(Question withdrawn.)

By Mr. Brown:

Q. You still have the Massachusetts Oil bonds, have you not, the 20,000?

A. We deposited all of the Massachusetts Refining bonds that we had in our possession with the reorganization committee.

Q. When did you do that?

A. At the time of the depositary.

Q. When was that?

A. I can't tell exactly but we can get it.

[fol. 142] Q. Before or after July of 1922?

A. After July of 1922.

Q. Did you advise Mr. Pearson?

Mr. Henderson: Objected to as being after July of 1922.

The Court: Why is that relevant?

Mr. Brown: I am frank to admit that I don't think it is, and I won't go into it.

WALLACE McKEAG sworn and examined as follows:

Direct examination.

By Mr. Henderson:

Q. In the month of May, 1921, by whom were you employed?

A. A. B. Leach & Company.

Q. Where?

A. 115 South Fourth Street.

Q. Mr. Rierra testified yesterday that he brought to A. B. Leach & Company, 20,000 Massachusetts Oil bonds on the tenth day of May, 1921, and that he received from A. B. Leach & Company a check for $15,000. Do you have your records with reference to that transaction?

A. Not on the tenth.

Q. Do you have your records with reference to the note of 15,000 and the loan in connection with it?

A. On the eleventh.

Q. Let me see your records. What is that record you have in your hand?

A. That is the record of securities received and delivered on May 11th, 1921.

Q. And who has charge of receiving those securities and making the entries in that particular record?

A. I do. It is in my handwriting.

[fol. 143] Q. That is a loose leaf sheet out of your original book?

A. Yes, I took it out yesterday.

Q. I want you to take a look at this note and that check.

A. That is my handwriting.

Q. Now, tell us on what date you received those Massachusetts Oil and Refining bonds?

A. May 11th.

Q. What year?

A. 1921.

Q. When these bonds first came in to you was a note attached to them?

A. It was not.

Q. What did you do?

A. I referred it to Mr. Miller.

Q. Then what did you do?

A. He refused to pay the $15,000 until a note was secured.

Q. And then what happened?

A. Then I received the bonds and paid the check.

Q. In other words a note came back signed, is that right?

A. That is right, yes, sir.

Q. And after you received the note, what did you do?

A. Attached it to the bonds.

Q. When did you issue your check for $15,000?

A. May 11, 1921.

Cross-examination.

By Mr. Brown:

Q. When Mr. Rierra called, you say it was on the 11th, he had the $20,000 bonds with him at that time, didn't he?

A. Yes, sir.

[fol. 144] Q. And he asked you for a check for $15,000?

A. That is right.

Q. Do I understand you to say that on that day you made out this note?

A. That is right.

Q. What did you do with the note when you made it out?

A. I handed it back to him.

Q. To whom?

A. The one that was delivering the bonds.

Q. Mr. Rierra?

A. I couldn't say his name. I never met the gentleman before.

Q. So that he had the note and the check, didn't he?

A. That is right. No, sir, not the note and the check. He had the note.

Q. You did not give him the check then?

A. No.

Q. When did you give him the check?

A. May 11th.

Q. When did you give him the note?

A. May 11th.

Q. So you gave him the note and the check at the same time, didn't you?

A. No, sir.

Q. When did you give him the check and the note?

A. I gave him the check on the 11th of May and I gave him the note on the 11th of May but not the same time.

Q. Well, when did you give him each?

A. I couldn't say the hour.

Q. Wasn't it the same day he came down there on the one visit?

A. No.

Q. Did he make two visits that day?

A. I couldn't say whether he made two visits that day [fol. 145] or not. He made two visits but whether the same day I don't know.

Q. When did you receive the signed note?

A. May 11th.

Q. You are certain about that, are you?

A. I am.

Q. And you are as certain of the fact that you received that note signed by Mr. Peirson before you delivered the check as you are of your other testimony?

A. That is right.

Q. And you refused to deliver the check this day until Mr. Peirson signed the note and you received his signed note?

A. That is right.

William H. Doerler sworn and examined as follows:

Direct examination.

By Mr. Henderson:

Q. You are an officer of A. B. Leach & Company?

A. Yes, I am assistant secretary and treasurer.

Q. How long have you been connected with A. B. Leach & Company?

A. Twelve to fourteen years.

Q. Where?

A. 400 Chestnut Street and 115 South Fourth Street.

Q. In the month of May, 1921, were you connected with A. B. Leach & Company?

A. Yes, sir.

Q. And in the same capacity you have just testified?

A. The same capacity.

Q. What is your system with reference to incoming mail [fol. 146] and what was your system on or about May the 9th, 10th and 11th of 1921?

A. I usually opened the mail and attended to the disposition of it, or had it opened.

Q. You had charge of the mail coming into your office?

A. Yes.

Q. Mr. Peirson claims that he wrote a letter, a copy of which I show you. Look at it and tell us if you ever recall receiving the original of that letter?

A. No, sir, we never received it. I remember it that we were asked to supply it.

Q. When did you first see that copy?

A. At the former trial of this case, about a year ago.

Q. If such a letter would have came to your place of business would it or would it not have come to your attention?

A. Yes, sir, it would have.

Q. And why?

A. Because I have charge of all the mail and either answer it myself or allot it to different departments it requires attention from.

Q. And that letter was never received?

A. Never received by us.

Q. In the month of May on or about the 9th, 10th, 11th and 12th, did you or did you not open any of the mail yourself?

A. Yes, I think I did. At that time I usually opened most of the mail.

Q. What time did your mail come in about that period in 1921?

A. Our first mail comes in probably somewhere between eight and half past eight.

Q. And what time did you come into the office?

A. I usually came in in summer months about half past eight. I cannot identify the particular day. It was some [fol. 147] where between half past eight and quarter after nine.

Q. But you state that the letter was never received by A. B. Leach & Company?

A. Never received by A. B. Leach & Company, no, sir.

Q. I show you a letter of April 21, 1922. Do you recall that letter?

A. I do.

Q. You received that letter?

A. We received that letter, yes, sir, the day after it was mailed.

Cross-examination.

By Mr. Brown:

Q. How big an office has Leach & Company in Philadelphia?

A. I imagine 18 feet front by 160 feet deep.

Q. How many people do you employ?

A. I suppose at that time we had from fifteen to twenty of us in the office.

Q. How many salesmen did you have out on the road?

A. About twenty.

Q. And how many letters which you received during the course of the day in May of 1921?

A. Well, I suppose our mail would run from possibly forty to a hundred.

Q. Sometimes more than that, wouldn't it?

A. Yes, it would be rare occasions where we would have an offering.

Q. And you say you opened the mail during this period for about how long, a year or more?

A. Oh, I have done it ever since I have been there.

Q. And can you remember the letters that you open running from forty to one hundred a day during, we will say, May of 1921?

[fol. 148] A. Oh, no.

Q. You cannot remember the letters, can you?

A. Oh, no, I couldn't identify them.

Q. You couldn't tell whether if you were shown a letter you had received it or not, could you, or whether it had passed through your hands?

A. Oh, yes, I could.

Q. You read everything, do you?

A. Yes, sir.

Q. Every letter that comes in the mail?

A. Well, yes. There is a lot of other stuff that I don't read.

Q. What is it you had in your mind? You were going to say something else?

A. I mean by reading every letter, letters that are letters. That is in our mail we get a vast amount of circular matter of offerings and circulars and I don't read all of those but I read all the letters that are directed to the firm, that is from bankers or individuals, as distinguished from circular letters.

Q. Do you remember any other letters you got from Mr. Pierson during that time?

A. No, we got very little correspondence from Mr. Pierson during all the time we were doing business with him.

HARRY O. PEEBLES sworn and examined as follows:

Direct examination.

By Mr. Henderson:

Q. What firm are you connected with?

A. Brown Brothers & Company, manager of the bond department.

Q. In what business are they engaged?

A. General banking, investment banking.

Mr. Brown: I ask for an offer of proof.

[fol. 149] (Offer of proof at side bar.)

Mr. Henderson: I offer to prove by this witness custom and usage established in the bond business in the city of Philadelphia as to the powers and purposes of a bond salesman, and that that custom and usage is recognized among bond houses as bearing upon the point that Mr. Mather's authority is either expressed or implied. His implied authority is gathered from the custom and usage of the business and under the authority also a person who deals with an individual where there is a customer or usage in connection with business is bound by that custom.

Mr. Brown: Objected to. The question of custom is not referred to or raised in the pleadings, and it seems to me the parties are bound by the pleadings.

(Objection sustained. Exception noted for defendant by direction of the Court.)

(Defendant rests.)

PLAINTIFF'S REBUTTAL EVIDENCE

EDWARD D. C. LYNCH recalled.

Direct examination.

By Mr. Brown:

Q. As I recall your testimony you testified that these $20,000 Massachusetts bonds had been delivered to you by Mr. Peirson?

A. Yes, sir.

Mr. Henderson: I will ask for an offer of proof.

(Offer of proof at side bar.)

Mr. Brown: Three of the defendant's witnesses in this case have testified that the check was not given until the note was signed by Mr. Peirson. I propose to prove by [fol. 150] this witness that these 20,000 Massachusetts bonds were delivered to him by Mr. Peirson and that under directions from Mr. Peirson they were taken by Mr. Rierra of his office to the office of A. B. Leach & Company. Mr. Rierra has testified that he received a check and a note in his hand. I propose to prove that check and unsigned note were returned by Mr. Rierra to Mr. Lynch and that Mr. Lynch then deposited the check for $15,000 in the Land Title & Trust Company to the credit of Mr. Peirson and sent the note, which was then unsigned, to Mr. Peirson, in a letter dated May 11th, in which it was stated, "We enclose herewith also a note for $15,000, covering the $20,000 Massachusetts Oil & Refining Company 7% bonds to A. B. Leach & Company with the necessary revenue stamps attached and cancelled. You are to sign the said note and return it to Leach & Company in the enclosed self-ad-

dressed stamped envelope. It goes to the credibility of these witnesses who testified they did not deliver the check for $15,000 until after the note was signed.

Mr. Henderson: Objected to.

(Objection overruled. Exception noted for defendant by direction of the Court.)

By Mr. Brown:

Q. Did you receive from Mr. Rierra a check for $15,000.
A. Yes, sir.
Q. What else did you receive?
A. A note filled out but not signed.
Q. Is that the note which you received?
A. Yes, sir.
Q. And it is the note dated May 11th, 1921?
A. Yes, sir.
[fol. 151] Q. When that was delivered to you did that have Mr. Walter Peirson's signature on it?
A. No, sir.
Q. What did you do with this note?
A. I first attached $3 worth of revenue stamps on the back of it and wrote a letter to Mr. Peirson informing him —

Mr. Henderson: Objected to.

The Witness: Well, I sent the note to Mr. Peirson for him to sign and return to A. B. Leach & Company.

By Mr. Brown:

Q. What did you do with the check for $15,000?
A. Marked on the back of it for credit only to account of Walter Peirson and deposited it in the Land Title & Trust Company to his credit as per his instructions.

By the Court:

Q. This was before the note was signed, was it?
A. Yes, sir.

By Mr. Brown:

Q. Is this the letter which you sent to Mr. Peirson?
A. Yes, sir, this is the letter enclosing the note.

Mr. Brown: I offer the letter in evidence.

Mr. Henderson: Objected to.

(Objection sustained. Exception noted for plaintiff by direction of the Court.)

WALTER PEIRSON recalled.

Direct examination.

By Mr. Brown:

Q. When you received that note dated May 11th, 1921, who did you receive it from and when did you receive it? [fol. 152] A. I got it enclosed in this letter from Mr. Lynch. The date I cannot recall.

Q. Was the note signed by you when you received it?

A. It was not signed until I received it.

Mr. Henderson: I object to this line of testimony as absolutely immaterial.

(Objection overruled. Exception noted for defendant by direction of the Court.)

By Mr. Brown:

Q. What did you do with that note when you received it?

A. Signed it and sent it to A. B. Leach & Company.

Q. How did you send it?

A. There was a self addressed envelope to them in Mr. Lynch's letter.

Q. I show you check for $15,000 drawn to the order of Walter Peirson by A. B. Leach & Company dated May 11, 1921. I call your attention to the endorsement on the back of that check. Is that your handwriting?

A. No, sir.

Q. Whose handwriting is that?

A. I don't know.

Q. What was done with that check?

A. It was deposited to my account.

Q. Where?

The Court: If he did not deposit it he cannot say. I do not see that all this questioning as to when the check was de-

livered or when he got it has anything to do with the case. The plaintiff admits that he is liable on the note, that he got the money on it.

[fol. 153] Cross examination.

By Mr. Henderson:

Q. You don't know when the check was deposited, do you?
A. Yes, I do.
Q. It was evidently on the twelfth of May?
A. No. Wait a minute. On the eleventh day of May, I have an entry in my bank book, $15,000.
Q. Who put the entry in the book?
A. The custom is ——
Q. We are not interested in custom. Do you know who put it in there?
A. No.

By Mr. Brown:

Q. The book you refer to is your deposit book with the Corn Exchange National Bank?
A. No, the Land Title & Trust Company.

(Testimony closed.)

Defendant's Requested Instructions to Jury. Filed May 18, 1925.

1. Under all the evidence your verdict must be for the defendant.

2. Burden rests on the plaintiff to prove the fact of agency and that the contract alleged to have been made by the agent was within the agent's powers.

3. One dealing with an agent is bound to ascertain the nature and extent of his authority.

4. One dealing with an agent is bound at his peril to inquire of the principal and not of the agent as to the agent's authority.

[fol. 154] 5. Your verdict must be for the defendant because it does not appear that Charles T. Mather, the sales

agent in this case, had any authority to bind the defendant by the contract upon which this suit is brought.

6. All trades have their usages and when a contract is made with a man about his business or craft, it is made on the basis of such usage which becomes a part of it.

7. If you find that there is an established and known usage among bankers in Philadelphia who sell corporate bonds and other securities to investors, to employ in the business bond salesmen with authority only to solicit orders and report them to their employers for acceptance or rejection, this is a reasonable and valid usage and the plaintiff is bound by it whether he had knowledge of it or not.

8. If you find that there is an established and well-known usage among bankers in Philadelphia engaged in selling bonds and other investment securities, to conduct that business by means of bond salesmen, whose sole duty and authority it is to solicit orders from customers and report them to their employer for acceptance or rejection, the plaintiff was bound by this usage to know that the agent in this case had no authority to bind his principal by the alleged contract upon which the plaintiff's case is based. The verdict should, therefore, be for the defendant.

Respectfully submitted.

(Sgd.) Joseph W. Henderson. Francis Rawle.

[fol. 153] Charge to Jury

Thompson, D. J.:

Ladies and gentlemen of the jury: This suit is brought by Walter Peirson against A. B. Leach & Company to recover damages for alleged failure of A. B. Leach & Company to carry out an agreement which the plaintiff claims was made by Leach's agent, Mr. Mather, at the time of the sale of these certain bonds concerning which you have heard. It is claimed on the part of the plaintiff that at the time of the respective sales and prior thereto, Mr. Mather agreed that at any time Mr. Peirson was dissatisfied with the bonds, A. B. Leach & Company would repurchase them

from him at the price that he had paid for them. That is denied on the part of the defendant and it is denied that Mr. Mather had any authority to make such an agreement.

So that the principal question in the case comes down to whether or not the defendant, through Mr. Mather made an agreement to that effect. Of course, if Mr. Mather made the agreement without authority from A. B. Leach & Company to do so, that ends the consideration of the testimony bearing on that fact, because a principal is not bound by the act of his agent unless the agent is acting within the scope of the authority given him by the principal.

In considering the testimony in this case the finding of facts is something which is exclusively for the jury. The jury is to find the facts and to apply the facts. The questions of law are questions for the Court and it is the duty of the jury to apply the evidence and the facts in the case after they are found in accordance with the instructions on the law as they are received from the Court.

You have heard the case argued by counsel and I have no doubt you will find the arguments of counsel concerning the [fol. 156] evidence very helpful to you in refreshing your memory on the facts which have been brought out by the evidence and their bearing on the controversy. As far as the questions of law, however, asserted by counsel on both sides are concerned, you are not to take them as binding but entirely the law as laid down by the Court. So that at the outset I will say to you it is not a question here, as stated by counsel for the plaintiff in closing, as to whether or not the defendant in fair dealing should stand by agreements which his agent made. That is not the law and it is not the point of view from which you will consider the case. You are to consider whether the defendant is legally bound by the agreement of his agent and not as to whether he should ratify unauthorized statements of his agent. So that the question in the case will come down to this fundamental issue. Was there an authority vested in Mather to make such an agreement as Mr. Peirson claims and as his witnesses testify to was made by Mr. Mather? If there was no such authority then it is immaterial whether Mr. Mather agreed to it or not, whether Mr. Mather agreed as Mr. Peirson says he did at the time these bonds were sold to Mr. Peirson. On the other hand, if there was no such

agreement made by Mr. Mather, as he has testified, then, of course, it does not make any difference whether he had the authority or not.

Mr. Peirson claims that when the bonds were sold that Mr. Mather made this agreement with him as to the repurchase of the bonds by the defendant. Mr. Mather denies that he made such an agreement, so there you have contradictory statements of the fact from either side, and it is a question for you in all cases to determine which side you will believe. The questions of fact all through the case will be for your determination.

If you determine that fact in favor of the defendant, if [fol. 157] you find that Mr. Mather did not make any such agreement, that ends the plaintiff's case entirely so far as his claim for damages is concerned. If, however, you find that there was such an agreement made, then you have the further fact to find as to whether or not that agreement was made in pursuance of authority given by A. B. Leach & Company.

There is no general authority—I think it will be conceded by both sides—in an agent for the sale of anything, to make an agreement of that sort. It must be through special authority given by his principal to him, and it may be either express or implied. When a plaintiff comes into court and is suing on a contract alleged to have been made by an agent, the burden is on him to show the agent's authority, and if he has any doubt in his mind as to the agent's authority, then he naturally is put upon inquiry, and if he comes into court without having established any authority on the part of the agent to do what he claims the agent did, his case falls. In order to establish that authority the plaintiff has offered evidence from which he asks you to find that the defendant was notified by a letter from Mr. Peirson to the defendant, dated May 9th, 1921, of which a copy is produced which the plaintiff claims is taken from his letter book, in which he states, in addressing Leach & Company: "Dear Sirs: When I purchased from you the Massachusetts Oil & Refining Company bonds it was agreed by Mr. Mather that any time I so desired you would take them off my hands at cost, 98. I have need of some money and will avail myself of this privilege. When shall I deliver them to you? Very truly yours, Walter Peirson."

The plaintiff's contention is that that letter was sent by mail to the defendant and there being the presumption that a letter put in the mail is received by the party to whom it it addressed, the plaintiff relied on the evidence he had produced to show you that the letter had come to A. B. Leach [fol. 158] & Company and that A. B. Leach & Company having failed to disaffirm what was stated in that letter that that was acquiescence upon their part to the statements made by Mr. Peirson as to their agent's authority to make this agreement. This letter, therefore, has a very important bearing upon the whole case. If A. B. Leach & Company received that letter and had notice that their agent had made this agreement and failed to disaffirm the statement made by Mr. Peirson as to what their agent had done or what Mr. Peirson said he had done, then you would be justified in finding that A. B. Leach & Company acquiesced in the agreement made by their agent and that he had authority to do what Mr. Peirson said he had done.

But the defendant has offered evidence to show that it never received that letter, so that whether the letter was written at the time, whether it was mailed or not, is entirely immaterial unless you believe from the evidence that A. B. Leach & Company did receive it. If they did not receive the letter, then, of course, it had no notice of the plaintiff's assertion that Mr. Mather had made this agreement, and so far as the effect of the letter on the case is concerned the plaintiff has failed in the proof of authority on the part of Mr. Mather to do what Mr. Peirson claimed he did in making the contract.

So that it is very important for you to take into consideration all of the facts and circumstances surrounding this letter. You are entitled to consider, it is your duty to consider in fact, that there is no such general authority in an agent as is claimed the agent had in this case. You are entitled to take into consideration your own experience and your knowledge of business affairs as to whether or not that would be a usual sort of authority for a company selling bonds in large quantities to give an agent. That all has a [fol. 159] bearing on your consideration of the testimony as to whether or not you believe that there was such authority given. In considering the letter itself, the defendant having been no doubt requested to produce the original and

having failed to produce it and having produced evidence to show that they never received it, the copy then becomes evidence if, in your opinion, it is a copy of a letter that was actually sent out at that time. The circumstances surrounding it are such as you have a right to consider. You may ask yourselves why a man who keeps a letter book in which he copies all his letters should cut out from the letter book a copy of a very important letter so that instead of having it in his letter book he has it on a piece of tissue paper, and you are justified in considering those circumstances in connection with the production of this letter, as to whether it is in its detached condition sufficient proof to satisfy you that it is a copy of a letter that was sent out and which the defendant claims that it never received, and in connection with that you are entitled to consider the testimony of the man who was on the stand, employed by Mr. Peirson in his office, who can remember with such very accurate distinctness the fact that he copied this particular letter and that he mailed the letter, and give his testimony such weight as you think it is entitled to in view of the fact that he is testifying to one item of occurrences on a day several years in the past. You will determine what weight you will give his testimony under those circumstances. I am merely calling your attention to these considerations to be given by you without indicating in any way, not intending to indicate in any way, any impressions that may have been made upon my mind by the testimony of any particular witness.

If you find that that letter was written and mailed and received by A. B. Leach & Company, then that would be [fol. 160] notice to A. B. Leach & Company of the fact that their agent had made the agreement which is in controversy here, and if they had such notice and failed to deny that their agent had such authority or that such an agreement was made, then you would be justified in considering that they acquiesced in what the agent had done and that the agent therefore had authority to do it. If you find that fact in favor of the plaintiff then you have covered the situation on the evidence as presented by the plaintiff here and you would be justified in returning a verdict in favor of the plaintiff. If you find that fact against the plaintiff then there is not sufficient evidence in the case to justify

any finding on your part that the defendant's agent had the authority which the plaintiff contends he had, because the plaintiff has undertaken to establish the burden put upon him of proving the authority by the testimony of which this letter is the central and controlling piece of evidence.

Of course there is other evidence in the case. There is evidence that at or about the time this letter was mailed, or a day or two afterwards, that the defendant was requested to loan the plaintiff $15,000, and agreed to loan him $15,000 upon security of these $20,000 face value of Massachusetts Oil bonds. There is no evidence, as I recall, that at the time of the negotiation in regard to this loan, outside of what the plaintiff presents by this letter, that anything was said concerning this alleged agreement to take these bonds back. But a loan was made to the plaintiff and the bonds were taken as collateral, merely for that loan. There is no controversy in the case that the plaintiff does owe the defendant that $15,000 with interest. So that it makes no difference which way you find as to the plaintiff, he is admittedly liable for the amount of that $15,000 loan. If you find in his favor then the amount of the $15,000 loan [fol. 161] is to be deducted from whatever amount you find in his favor. If you do not find in the plaintiff's favor then it will be your duty to return a verdict for the defendant for the $15,000 with interest, which I have no doubt has been computed by counsel and of which a statement will be handed to you.

If you find in favor of the plaintiff then the damages the plaintiff is entitled to recover would consist of the difference between the price paid for the bonds, which I understand was $39,250 and the admitted value of the bonds at the time demand was made on the defendant in July, 1922, for the acceptance of the bonds and the return of the purchase price, which the defendant refused, and that value was agreed by counsel as $11,500, the actual value of the bonds at that time being $11,500 as opposed to $39,250 at the time they were sold. So that if you find in favor of the plaintiff you will base your verdict on the difference between those two figures, which would represent the loss to the plaintiff at the time the demand was made, which amount is $27,750, and deduct from that $15,000 which the

plaintiff then owed the defendant, leaving a balance of $12,750. So that if you find in favor of the plaintiff your verdict should be for $12,750 plus interest to this date. If you find in favor of the defendant then your verdict should be in favor of the defendant for $15,000 plus interest from January 1st, 1922. Either the deduction of the $15,000 note or the verdict for the $15,000 note would carry interest from January 1st, 1922.

Mr. Brown: I withdraw all my requests for charge.

Mr. Henderson: I withdraw all my requests for charge except No. 1.

The Court: The point for binding instructions is declined and an exception granted to defendant.

[fol. 162] (Counsel for plaintiff and defendant requested the learned Judge to direct the stenographer to reduce the notes of testimony and charge, together with the point presented by defendant's counsel, and the answer thereto, to typewriting and file the same of record in the cause, which request was granted and the stenographer so directed.)

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record:

The said counsel for the said defendant, did then and there tender this Bill of Exceptions to the opinion of the said Court and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided, and thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided this first day of May, 1925.

(Sgd.) J. W. Thompson, J. (L. S.). John Arthur Brown, For Plaintiff.

[fol. 163] In United States District Court

Motion and Reasons for a New Trial—Filed February 21, 1925

And now, to wit, this twentieth day of February, 1925, the defendant by its attorney, Joseph W. Henderson, respectfully moves the Court for a new trial and assigns the following reasons therefor:

1. The verdict was against the law.

2. The verdict was against the evidence.

3. The verdict was against the weight of the evidence.

The defendant requests leave to file additional reasons in support of this motion when the notes of testimony shall have been transcribed, and an opportunity shall have been had to inspect same.

(Sgd.) Joseph W. Henderson, Francis Rawle, Attorneys for Defendant.

In United States District Court

Supplemental Reasons for a New Trial—Filed March 28, 1925

1. Because under the charge of the learned Court that whether the letter of May 9, 1921, was written or not, or mailed or not, was entirely immaterial unless the jury believed that defendant received it, the verdict ought not to stand in the teeth of the direct and undisputed testimony of two credible witnesses—Miller and Doebler, that the letter had not been received, there being no direct evidence [fol. 164] whatever that it was received, and there being no reasonable ground for throwing out the testimony of those two witnesses as not worthy of belief.

2. Because where the crux of a case is as to whether a certain letter written by the plaintiff was received by the defendant, a verdict ought not to stand when the sole evidence for the plaintiff is the recollection (nor more than upon

information and belief) of plaintiff's clerk that he copied and mailed the letter three years and eight months before, as against the positive and undisputed evidence of two credible employees of the defendant both charged with the duty of supervising the incoming mail in defendant's office, and one of them vice-president of the defendant company and in charge of its Philadelphia office for the past seventeen years and the other assistant secretary and treasurer thereof for over twelve years, that the said letter had never been received by the defendant.

3. Because the jury, in disregarding the undisputed testimony of Mather and Doebler that the letter of May 9, 1921, had not been received by defendant, were not passing upon any question of conflicting evidence upon that point, there having been no direct evidence before the jury that the letter had been received.

4. Although the learned Court charged that the receipt of the letter of May 9, 1921, taken together with the defendant's not having answered it, constituted the sole evidence of the agent's authority to make the repurchase agreement of Massachusetts Oil bonds, yet he did not comment on the force of the undisputed testimony of Mather and Doebler that the letter had not been received.

[fol. 165] 5. Because the learned Judge in his charge while commenting upon the plaintiff's evidence that the letter of May 9, 1921, had been mailed, failed to call the attention of the jury to the undisputed evidence of defendant's two witnesses, Miller and Doebler, both having charge of defendant's incoming mail, that the letter had not been received by defendant.

6. Because the learned Judge left it to the jury to find that the letter of Peirson of May 6, 1921, was received by the defendant, although the evidence of its having been mailed was merely the evidence of a clerk (Stinger) testifying to his having copied a letter in a press copy book and having mailed it three years and eight months previously, such evidence being given by Stinger on nothing more than information and belief.

7. Because the testimony of Stinger that he copied and mailed the letter of May 9th, 1921, was too vague and un-

certain and related to too remote a prior date to warrant its submission to the jury, or to sustain the burden of proof of agency resting on the plaintiff to establish the agent's authority.

8. Because the testimony of the witness, Stinger, relating to a date three years and eight months before, to the effect that he had copied and mailed to the address of the defendant the letter of May 9, 1921, was inadequate and insufficient to warrant its submission to the jury as evidence that the letter was received by the defendant.

9 Because the learned Judge admitted the evidence of Stinger as to copying and mailing the letter of May 9, 1921, although it had been mutilated and was for that reason disqualified as an instrument of evidence.

[fol. 166] 10. Because the self serving letter of May 9th, 1921, written about eight months after the transaction to which it related cannot (even if received) be allowed to have imposed any legal duty upon the defendant to answer the letter, nor to have created evidence on behalf of the plaintiff from the fact that the defendant did not answer the letter.

11. Because the learned Judge left it to the jury to find that the agent had authority to make the alleged repurchase agreement from the fact that the defendant did not reply to Peirson's letter of May 9, 1921, in which Peirson states that he informed the defendant that its agent had made such an agreement with him in respect to the Massachusetts Oil bonds, inasmuch as a party cannot by a self serving writing such as that letter create evidence for himself, that the agent had authority to make such a contract.

12. Because the learned Court left to the jury the vital fact of the agent's authority to make the repurchase agreement from the letter of May 9, 1921, and the further fact that defendant had not replied to it (which letter the Court charged to be the real crux of the case).

13. Because the learned Judge left it to the jury to find that defendant's agent had authority to make the alleged repurchase agreement of Massachusetts bonds from the fact the defendant did not reply to the letter of May 9, 1921, written more than eight months after the sale of the Massachusetts bonds, and written to request performance by de-

fendant of the alleged contract to repurchase the Massachusetts bonds.

14. Because the verdict for the plaintiff includes damages for the refusal to repurchase $10,000 of Whitmer-Par-
[fol. 167] sons bonds, and $10,000 of National Oil Company bonds, although there was no evidence that Mather in selling those bonds had authority to make a contract to repurchase them.

15. Because the verdict by including damages for refusal to repurchase the Whitmer-Parsons bonds and National Oil bonds, is not to that extent sustained by any evidence that the agent had authority to make a repurchase agreement, or by any evidence that the defendant afterwards ratified the alleged acts of its agents.

16. Because the learned Court did not give binding instructions for defendant and direct the jury in making up their verdict not to consider any damages in respect of the Whitmer-Parsons bonds and the National Oil bonds.

17. Because the learned Judge permitted plaintiff's counsel to introduce evidence of a repurchase agreement with defendant's agent without preliminary evidence that the agent had authority to make such agreement.

18. Because the failure of the learned Judge to require the plaintiff's counsel to put in his case in the usual and orderly way by proof of agency before offering evidence of a contract made by such agent, prejudiced the minds of the jury by leading them to believe throughout the taking of the evidence that the plaintiff need only produce evidence of the alleged agreement and that they could assume or pass by the question of the agent's authority, which erroneous view, lasting through the trial, could not be removed from the jury's minds by any words of the charge.

19. Because the learned Judge permitted the plaintiff to testify to a repurchase agreement with the defendant's
[fol. 168] agent without first requiring proof of the authority of the agent to make such a contract, merely stating that he would pass on the sufficiency of the evidence, after the evidence was in.

20. Because letting in the evidence of the alleged contract of repurchase without prior evidence that the agent had authority to make such a contract, unduly prejudiced the minds of the jury in favor of the plaintiff and impressed upon them throughout the trial the belief that the dominant or only question before them was whether or not the agent made such an agreement of repurchase.

21. Because the learned Judge refused to admit testimony as to the custom and usage in Philadelphia among banking houses in regard to the authority of bond salesmen in selling bonds, inasmuch as such testimony would have had weight with the jury as showing them that the defendant in this business was carrying it on in accordance with the universal custom and usage.

22. Because the learned Judge refused the motion of defendant's counsel for an order on the witness, Walter Pierson, to produce his Federal income tax returns.

23. Because the act of the plaintiff in pledging his $20,000 of the Massachusetts Oil bonds to the defendant as collateral security for a loan of $15,000 within a day or so of the letter of May 9, 1921, is absolutely contradictory of the plaintiff's contention that he had an agreement with defendant to repurchase the said bonds.

24. Because the learned Judge, in his charge, did not comment on the undisputed evidence that on the day after [fol. 169] the date of the letter of May 9, 1921, the plaintiff pledged his Massachusetts Oil bonds to the defendant for a loan of $15,000 and that on or about April 21, 1922, or thereafter he deposited his Whitmer bonds with the reorganization committee, both acts evincing absolute and unconditional ownership thereof and being entirely inconsistent with his allegation of a repurchase agreement thereof.

25. Because the learned Judge in his charge failed to comment to the jury upon the fact that the plaintiff when receiving confirmatory notices of the respective sales to him, made no communication to defendant of the extraordinary and unusual contract of repurchase and at no time communicated to the defendant information of the extraor-

dinary contract he alleged its agent had made with him for the repurchase of the Whitmer and National Oil bonds.

26. Because the learned Judge refused the defendant's motion at the close of plaintiff's case for a nonsuit.

27. Because the learned Judge declined to give binding instructions to the jury as requested by defendant's point for charge.

Respectfully submitted.

(Sgd.) Joseph W. Henderson, Francis Rawle, Attorneys for Defendant.

[fol. 170] In United States District Court

Before Thompson, J.

Order Denying Motion for New Trial—Filed April 30, 1925

And now, to wit, this thirtieth day of April, A. D. 1925, it is

Ordered that the defendant's motion for new trial be and the same is hereby denied.

By the Court

Attest:

(Sgd.) George Brodbeck, Clerk.

In United States District Court

Praecipe for Judgment—Filed April 30, 1925

Enter judgment in favor of the plaintiff and against the defendant for the sum of $14,726.25, with interest from February 19, 1925.

(Sgd.) John Arthur Brown, Henry P. Brown, Attorneys for Plaintiff

April 30, 1925.

In United States District Court

Judgment—Filed April 30, 1925

Thompson, J.:

And now, April 30, 1925, by praecipe filed and in accordance with the verdict, judgment in the sum of fourteen thousand seven hundred twenty six and 25 100 ($14,726.25) [fol. 171] dollars is hereby entered in favor of plaintiff and against the defendant.

By the Court.

Attest:

(Sgd.) E. G. Johnson, Deputy Clerk.

In United States District Court

Petition for Writ of Error and Order Allowing Same. Filed May 9, 1925

And now, to wit, this ninth day of May, 1925, A. B. Leach & Company, Incorporated, the defendant in the above-entitled case conceives it is aggrieved by the final judgment of the Court, entered on the thirtieth day of April, 1925, hereby prays for a writ of error to the United States Circuit Court of Appeals for the Third Circuit, and that a transcript of record of the proceedings and papers from which said final judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And your petitioner will ever pray, etc.

(Sgd.) Francis Rawle, Joseph W. Henderson, Counsel for Defendant.

Before Thompson, J.

Order—Filed May 9, 1925

And now, to wit, May 9, 1925, it is ordered that the writ of error be allowed as prayed for, said writ of error to

act as a supersedeas upon bond being filed in sum of $29,452.50.

By the Court.

Attest:

(Sgd.) Leo A. Lilly, Deputy Clerk.

[fol. 172] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed May 9, 1925

The defendant, A. B. Leach and Company, Incorporated, assigns for error, as follows:

1. The learned trial Judge erred in admitting the testimony of the plaintiff in accordance with the following offer of proof:

"Mr. Brown: I expect to prove Mr. Mather saw Mr. Peirson; that he stated that he was the representative of Leach & Company, and that Leach & Company were bringing out these securities. That he induced Mr. Peirson to purchase these securities that I have mentioned, with the understanding that the Leach Company stood back of these securities and that if at any time Mr. Peirson desired, they would take them off his hands at the price he paid for them. That was the inducement that led Mr. Peirson to purchase, and the representation was made by the agent.

"I will go further and say that shortly after that time, within a period of a few months, Mr. Peirson addressed a letter to Leach & Company in which he referred to this arrangement under which he had purchased these securities, in the case of the Massachusetts Oil bonds. I will prove that letter was delivered to Leach & Company and it was never denied that this arrangement was made at that time. I will also prove that the second letter, embodying the same demand or the same statement was delivered to Leach & Company in which he called on them to live up to their contract, and Leach & Company never denied this arrangement had been made. I appreciate the difficulties in my case, but it does seem to me under the circumstances where we bring home knowledge of the representation made

by the agent to the principal and that is not denied by the principal, that connected with the representation offers sufficient evidence on which the jury could infer the au- [fol. 173] thority of the agent to make the representation."

* * * * * * *

"The Court: I will overrule the objection, in view of the offer of proof, and pass on the sufficiency of the evidence, after the evidence is in."

* * * * * * *

"Mr. Henderson: I understand my reservation goes to this entire testimony after it is in, and all our rights are reserved as to its admissibility."

2. The learned trial Judge erred in admitting in evidence the letter of May 9, 1921, as follows:

"Mr. Brown: I offer in evidence letter of May 9th, 1921, as represented by this copy.

"Mr. Henderson: Objected to.

"The Court: Well, that is a question for the jury. The credibility of the witnesses is for the jury.

"Mr. Henderson: There has been no testimony that this particular letter was mailed. Mr. Stinger did not say so on the stand.

"The Court: As I recall it he did say he mailed the letter.

"Mr. Henderson: I further object to this letter as a self serving document, and I ask that it be handed to your Honor to pass upon.

"The Court: Of course it is a self serving document but it may become something else if it is received by the defendant.

"(Objection overruled. Exception noted for defendant by direction of the Court.)"

3. The learned trial Judge erred in refusing defendant's motion for a directed verdict in favor of defendant, as follows:

"Mr. Henderson: I withdraw all my requests for charge except No. 1.

[fol. 174] "The Court: The point for binding instructions is declined and an exception granted to defendant."

4. *The learned trial Judge erred in admitting in evidence* the letter of May 9th, 1921, and instructing the jury thereon as follows:

"If you find that that letter was written and mailed and received by A. B. Leach & Company, then that would be notice to A. B. Leach & Company of the fact that their agent had made the agreement which is in controversy here, and if they had such notice and they failed to deny that their agent had such authority or that such an agreement was made, then you would be justified in considering that they acquiesced in what the agent had done and that the agent therefore had authority to do it."

although the plaintiff's second purchase of Massachusetts Oil bonds, the Whitmer and the National Oil bonds were not mentioned nor referred to in the said letter.

5. The learned trial Judge erred in refusing to order the plaintiff to produce his Federal income tax returns for the years 1921, 1922 and 1923, as follows:

"Mr. Henderson: At this time I wish to again make a motion I made last evening, and that is that I have requested Mr. Brown, giving him notice to produce the income tax returns of Mr. Peirson for the years 1921, 1922 and 1923, solely for the purpose of showing what he did on those returns on these particular securities, for this purpose, that whatever action he took in connection with those securities it is for the jury to determine whether or not he did have a repurchase agreement, and anything he did that might throw light on the question to the jury that he may have had that agreement is perfectly proper in this [fol. 175] case. I only want the returns for that purpose and I do not want to pry into anything else.

"The Court: Before passing on that I would like to understand from you what action taken in his returns would be relevant and how?

"Mr. Henderson: If Mr. Peirson deducted on his tax returns a loss sustained in connection with these securities that would seem to be very relevant and material to the

jury in determining whether or not a man who claimed he had a guarantee from a company to repurchase securities, whether he would not insist on their carrying out their guarantee, and would make a reduction on his tax return with reference to these particular securities.

"Mr. Brown: I have no objection to Mr. Henderson asking this witness, who is under oath, whether or not he made any deduction under the circumstances. Mr. Peirson is willing to say exactly what he did do.

"The Court: You may question him on his income tax returns."

* * * * * * *

"Mr. Henderson: In reply to that the answer is this, that we are not interested except in that one fact. Any admission against interest is evidence and it seems to me if this man has handled these particular securities on his tax returns and has deducted them, it is an admission against interest. If we are overruled in the matter we have no questions to ask with reference to it.

"(Objection sustained. Exception noted for defendant by direction of the court.)"

6. The learned trial Judge erred in admitting the testimony of the plaintiff as follows:

"By Mr. Brown:

"Q. Is it or is it not a fact that at or about the time or shortly afterwards these three companies went into the hands of the receivers?

[fol. 176] "Mr. Henderson: Objected to.

"(Objection overruled. Exception noted for the defendant by direction of the Court.)"

7. The learned trial Judge erred in refusing the defendant's offer of proof as follows:

"Mr. Henderson: I offer to prove by this witness custom and usages established in the bond business in the City of Philadelphia as to the powers and purposes of a bond salesman, and that that custom and usage is recognized among bond houses as bearing upon the point that Mr. Mather's

authority is either expressed or implied. His implied authority is gathered from the custom and usage of the business and under the authority also a person who deals with an individual where there is a custom or usage in connection with business is bound by that custom.

"Mr. Brown: Objected to. The question of custom is not referred to or raised in the pleadings, and it seems to me the parties are bound by the pleadings.

"(Objection sustained. Exception noted for defendant by direction of the Court.)"

8. The learned trial Judge erred in entering judgment for the plaintiff and against the defendant.

Francis Rawle, Joseph W. Henderson, Counsel for Defendant.

[fol. 177] IN UNITED DISTRICT COURT

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed May 9, 1925

To the Clerk of the United States District Court:

In making up the record sur writ of error in the above case, you will include the following papers and no others:

Docket Entries.
Writ of Error.
Plaintiff's Amended Statement of Claim.
Supplemental Affidavit of Defense and Counter-Claim.
Plaintiff's Reply to Supplemental Affidavit of Defense and Counter-Claim.
Defendant's Points for Charge.
Bill of Exceptions.
Motion and Reasons for a New Trial.
Supplemental Reasons for a New Trial.
Order Denying Defendant's Motion for New Trial.
Praecipe for Judgment.
Judgment.
Petition for Writ of Error.
Order Allowing Writ of Error.
Assignments of Error.

Praecipe Sur Transcript of Record.
Clerk's Certificate.

(Sgd.) Francis Rawle. Joseph W. Henderson.

[fol. 178] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 179] Minute entry of argument and submission November 6, 1925; omitted in printing.

[fol. 180] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1925

No. 3365

A. B. Leach & Company, Incorporated, Plaintiff in Error,

vs.

Walter Peirson, Defendant in Error

In Error to the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

Opinion—Filed March 9, 1926

Buffington, Circuit Judge:

This case grows out of a purchase of bonds from A. B. Leach & Co., the defendant, by Walter Peirson, the plaintiff. The latter claimed that when he bought the bonds from Leach & Company's agent, Mather, the latter agreed that if Peirson was dissatisfied with them, Leach & Company would repurchase at the purchase price. Having become dissatisfied with them, Peirson tendered Leach & Company the bonds, and on their refusal to repurchase, brought this suit. On their part, Leach & Company denied that Mather had so agreed, and also averred he had no au-

thority to so agree. The case was tried on these issues and a verdict rendered for the plaintiff. Whereupon, Leach & Company sued out this writ.

The facts, issues and questions involved were very clearly stated in the Court's charge:

"Mr. Peirson claims that when the bonds were sold that Mr. Mather made this agreement with him as to the repurchase of the bonds by the defendant. Mr. Mather denies that he made such an agreement, so there you have contradictory statements of the fact from either side, and it is a question for you in all cases to determine which side you will believe. The questions of fact all through the case will be for your determination.

If you determine that fact in favor of the defendant, if you find that Mr. Mather did not make any such agreement, that ends the plaintiff's case entirely so far as his claim for damages is concerned. If, however, you find that there was such an agreement made, then you have the further fact to find as to whether or not that agreement was made in pursuance of authority given by A. B. Leach & Company.

There is no general authority—I think it will be conceded by both sides—in an agent for the sale of anything, to make an agreement of that sort. It must be through special authority given by his principal to him, and it may be either express or implied. When a plaintiff comes into court and is suing on a contract alleged to have been made by an agent, the burden is on him to show the agent's authority, and if he has any doubt in his mind as to the agent's authority, then he naturally is put upon inquiry, and if he comes into court without having established any authority on the part of the agent to do what he claims the agent did, his case falls. In order to establish that authority the plaintiff has offered evidence from which he asks you to find that the defendant was notified by a letter from Mr. Peirson to the defendant, dated May 9th, 1921, of which a copy is produced which the plaintiff claims is taken from [fol. 181] his letter book, in which he states, in addressing Leach & Company: 'Dear Sirs: When I purchased from you the Massachusetts Oil & Refining Company bonds it was agreed by Mr. Mather that any time I so desired you would take them off my hands at cost, 98. I have need of

some money and will avail myself of this privilege. When shall I deliver them to you? Very truly yours, Walter Peirson.'

The plaintiff's contention is that that letter was sent by mail to the defendant and there being the presumption that a letter put in the mail is received by the party to whom it is addressed, the plaintiff relied on the evidence he had produced to show you that the letter had come to A. B. Leach & Company and that A. B. Leach & Company having failed to disaffirm what was stated in that letter that that was acquiescence upon their part to the statements made by Mr. Peirson as to their agent's authority to make this agreement. This letter, therefore, has a very important bearing upon the whole case. If A. B. Leach & Company received that letter and had notice that their agent had made this agreement and failed to disaffirm the statement made by Mr. Peirson as to what their agent had done or what Mr. Peirson said he had done, then you would be justified in finding that A. B. Leach & Company acquiesced in the agreement made by their agent and that he had authority to do what Mr. Peirson said he had done.

But the defendant has offered evidence to show that it never received that letter, so that whether the letter was written at the time, whether it was mailed or not, is entirely immaterial unless you believe from the evidence that A. B. Leach & Company did receive it. If they did not receive the letter, then, of course, it had no notice of the plaintiff's assertion that Mr. Mather had made this agreement, and so far as the effect of the letter on the case is concerned the plaintiff has failed in the proof of authority on the part of Mr. Mather and do what Mr. Peirson claimed he did in making the contract."

By the finding of the jury, the question of receipt of the letter by A. B. Leach & Company, and their failure to disaffirm it are established in the plaintiff's favor and no error is shown in the verdict unless the Court erred in receiving the letter in evidence. If it was so in error, it follows that the defendant was entitled to binding instructions. Strong objection is made to the admission of the letter, that it was inadmissible, because self serving. The Court recognized that, standing by itself, the statements of the letter

were self serving and could not affect Leach & Company, and so instructed the jury, saying, as quoted above, that if Leach & Company did not receive it, "the plaintiff has failed in the proof of authority on the part of Mr. Mather to do what Mr. Peirson claimed he did in making the contract." On the other hand, if this letter, self-serving though it be, was received by Leach & Company, then in the peculiar circumstances of this case the more self serving it was in its assertions, the more insistently it called for disaffirmance by Leach & Company, and if not disaffirmed and repudiated, its self-asserting statements created an acquiescing and consenting situation against Leach & Company from which a jury might infer that Mather had been authorized to make the statements, or, that having made them, Leach & Company had ratified them. Being pertinent and evidential [fol. 182] on the question of ratification, we are of opinion the Judge committed no error in admitting the letter. We may add that we have not overlooked the fact that the Court in admitting the letter did not limit its effect to the bonds mentioned therein but as such point was not raised either in objections to testimony or exceptions to charge, the matter is not before us for review.

The judgment below is affirmed.

[File endorsement omitted.]

[fol. 183] In United States Circuit Court of Appeals

[Title omitted]

In Error to the District Court of the United States for the Eastern District of Pennsylvania

JUDGMENT. Filed March 9, 1926

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, March 9, 1926.

Per Curiam.

Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 184] And afterwards, to wit, on the eighth day of April, 1926, a petition for rehearing was filed on behalf of A. B. Leach & Company, Inc., Plaintiff in Error, whereupon the Court made the following order:

[fol. 185] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Petition for Rehearing—Filed May 15, 1926

And now, to wit, May 15, 1926, after due consideration the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, May 15, 1926.

Per Curiam.

By W. P. R., Circuit Judge.

[File endorsement omitted.]

[fol. 186] In United States Circuit Court of Appeals

Mandate

The President of the United States of America to the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Eastern District of Pennsylvania, before you or some of you, in a cause between A. B. Leach Co., Inc. (defendant below), Plaintiff in Error, and Walter Pearson,

(plaintiff below) Defendant in Error, a judgment was entered in the said District Court on the thirtieth day of April, 1925, which judgment is of record in the office of the Clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof [fol. 187] as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of Writ of Error agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

[fol. 188] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and twenty-five, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause be, and the same is hereby affirmed with costs; and that the said Walter Pierson, Defendant in Error, recover against the said A. B. Leach & Co., Plaintiff in Error, in the sum of twenty dollars ($20.00) for his costs herein expended, and have execution therefor.

Philadelphia, March 9, 1926.

[fol. 189] You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said Writ of Error notwithstanding.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Philadelphia, the fifteenth day of May, in the year of our Lord one thousand nine hundred and twenty-six.

William P. Rowland, Deputy Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Costs of Walter Pierson:

Clerk	$
Printing Record	$
Attorney	$20 00
	$20 00

[fol. 190] In United States Circuit Court of Appeals

[Title omitted]

Order Recalling Mandate. Filed May 17, 1926

Upon consideration of application by counsel for Plaintiff in Error in the above entitled cause and their expressed intention of applying to the Supreme Court of the United States for a Writ of Certiorari therein;

It is hereby ordered that the Mandate of this Court issued on May fifteenth, Nineteen Hundred Twenty-six to the United States District Court for the Eastern District of Pennsylvania be forthwith returned.

Philadelphia, May 17, 1926.

Joseph Buffington, Circuit Judge.

[File endorsement omitted.]

[fol. 191] In United States Circuit Court of Appeals

[Title omitted]

Order Vacating Order Denying Petition for Rehearing. Filed May 25, 1926

It is hereby ordered that the order denying petition for rehearing entered on May 15, 1926, be, and the same is hereby vacated and withdrawn.

Philadelphia, May 25, 1926.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 192] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 195] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3512)

[redacted]

"The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights." Story, J., in Hildreth v. Welch, 8 Wheat. 234, 238.

TABLE OF CASES.

	Page
Allan v. Peters, 4 Phila. 78	45
Amer. Agricult. Chem. Co. v. Hogan, 213 F. 416	12
Amer. Issue Pub. Co. v. Sloan, 248 F. 251	13
B. & O. R. Co. v. Baugh, 149 U. S. 368	49, 55
Biggs v. Stuebler, 93 Md. 100	22
Bucher v. Cheshire R. Co., 125 U. S. 555	11
Chicago v. McGreshney, 205 Ill. 372	22
Chicago & N. W. Ry. Co. v. Kendall, 167 F. 62	20
Davis v. Gray, 16 Wall. 203	12
Dempsey v. Dobson, 174 Pa. 122	15
DuPont de Nemours & Co. v. Tomlinson, 230 F. 634	28
Ex Parte Fisk, 113 U. S. 713	11
Ex Parte McNeil, 13 Wall. 236	14
Fraley v. Bispham, 10 Pa. 320	14
Franklin Sugar Co. v. Lutey Supply Co., 6 F. (2d) 218	13
Gaskill v. Skerm, 14 Ad. & E. (N. S.) 664	45
Gray v. Kaufman, 162 N. Y. 388	21
Hamilton Shoe Co. v. Wolf Brothers, 240 U. S. 251	4
Hammond v. Brown, 114 Mo. 138	22
Harris v. Fagan, 226 F. 389	20
Hill v. Pratt, 29 Vt. 119	22
Holler v. Weiner, 15 Pa. 242	14
Kane v. Bennett, 223 Pa. 36	10
Kumm v. Linz, 229 Mass. 73	20
Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257	1, 17
Lynn Storage Co. v. Senator, 3 F. (2d) 558	30
Magnum Co. v. Coty, 262 U. S. 159	4
Morris v. Norton, 75 F. 914	20
Myers *et al.* v. Moore Bale Co., 270 F. 433	14
Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221	11
Nicholls v. Webb, 8 Wheat. 326 (on Back of Front Cover)	

TABLE OF CASES—Continued.

	Page
Packer v. United States, 166 F. 926	17
Richards v. Gellatly, L. R. 7 C. P. 147	22
Roman Law	44
Rumble v. United States, 143 F. 772	16
Seevers v. Cleveland Coal Co., 158 Ia. 574	22
State v. Howell, 61 N. J. L. 142	22
State Bank v. McCabe, 135 Mich. 479	22
Thomas v. Jones, (1920) 2 K. B. 399	43
Thomas v. Jones, (1920) 1 K. B. 22 (C. of A.)	43
Thrush v. Fullhart, 210 F. 1	19
U. P. R. Co. v. Yates, 70 F. 584	50
Vigle v. McLean, 200 N. Y. 460	41
West Tenn. Grain Co. v. Shaffer, 295 F. 197	45
Wiedemann v. Walpole, 2 Q. B. 534 (1891)	43
Woolsey v. Haynes, 165 F. 891	19

SUBJECT INDEX.

	Page
Official Report of the Opinion Below	1
Grounds of Jurisdiction	1
Date of Judgment Below	1
Claims Advanced and Rulings Below Relied Upon as Basis of Court's Jurisdiction	1
Statutory Provisions on Jurisdiction	1
Cases Relied on to Sustain Jurisdiction	2
Statement of the Case	2
The Bonds in Suit, List of	2
The Unanswered Self-Serving Letter	4
Its Admission	5
The Charge Quoted	6
Opinion in Circuit Court of Appeals Quoted	6
The Verdict	7
Specifications of Error Relied Upon	8
Argument	
Summary of Points	10
1 The Trial Court Was Bound by the Conformity Acts to Follow the Decision of the Highest Court of Pennsylvania on Rules of Evidence	11
The Text of Section 34 of Conformity Act of 1789	11
Authorities in This Court	11
Cases to the Same Effect in Lower Federal Courts	12
2 The Pennsylvania Cases Reject Such a Letter Uniformly	14
3 The Trial Judge Erred in Not Directing a Verdict for Defendant	16
4 Under All the Authorities—Everywhere—Such a Letter Has Been Held Inadmissible, Apart From the Conformity Acts	17
Federal Cases	17
Cases in State Courts	20
Cases in English Courts	22

SUBJECT INDEX—Continued.

Page

Roman Law 44

The Letter Was Not a Part of a Correspondence 44

It Was Not a Demand or Notice 44

5. There is a Lack of Uniformity in Circuit Courts of Appeals 45

The Cases 46

Respondent's Argument in C. C. A. 30

6. Swift v. Tyson Considered 31

OFFICIAL REPORT OF THE OPINION BELOW.

The Opinion of the Circuit Court of Appeals (R., 146), is Reported in 16 F. (2d) 86.

1. The judgment to be reviewed is that of the Circuit Court of Appeals for the Third Circuit, dated March 9th, 1926. (R., 146.)

2. At the trial the sole evidence that the bond salesman of the defendant (below), a bond house, had authority to make the alleged contracts in suit to buy back at cost the bonds he sold to the plaintiff (below) if at any time requested, was an unanswered self-serving letter (R., 36), from plaintiff to the defendant, written some seven months after the transaction in suit, which plaintiff offered in evidence. The trial Judge admitted the letter as proof of the facts stated in it—refusing to obey the Conformity Acts, and to follow the uniform decisions of the highest court of Pennsylvania that such a letter was inadmissible for that purpose.

All the decisions of the highest court in Pennsylvania hold such a letter to be inadmissible for that purpose.

The trial court also erred (apart from the Conformity Acts) in not following the uniform decisions of the courts in this country and England holding such a letter to be inadmissible. The Circuit Court of Appeals erred in affirming this ruling and the judgment based upon it.

The entire record is now before this Court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267.

3. The jurisdiction of this court is based upon the Judicial Code, Sec. 240, taken from the Act of March 3, 1891 (26 Stat. 828; 2 Comp. Stat., Sec. 1217).

4. There is a lack of uniformity in the judgments of several Circuit Courts of Appeals as to whether or not the Conformity Acts apply to state rules of evidence. This present case, therefore, involves the constitutional relations between the United States and the States, and therefore comes within the rule in *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 258 ("Cases of peculiar gravity and general importance, or in order to secure uniformity of decision") and the rule in *Magnum v. Coty*, 262 U. S. 159, 163 ("To secure uniformity of decision between courts in the nine circuits and to bring up questions of importance which it is in the public interest to have decided by this Court of last resort").

STATEMENT OF THE CASE.

The plaintiff below, Walter Peirson, a leather merchant in Philadelphia, bought the following investment securities from the defendant below, A. B. Leach & Co., Inc., a New York bond house having a branch office in Philadelphia, and doing a yearly business of from one hundred to one hundred and fifty million dollars. See Statement of Claim (R., 3). *Peirson* (R., 17-24):

$10,000	William Whitmer & Sons, Inc. Parsons Pulp & Rubber Company, Joint and Refunding 7% Gold Bonds.	
	Purchased June 19, 1920	$9,800
$20,000	Mass Oil & Refining Company, 7% Convertible Gold Bonds.	
	Purchased September 23, 1920	$19,600
$10,000	National Oil Company, First Lien 7% Serial Gold Bonds.	
	Purchased February 28, 1921	$9,850
		$39,250.

The action was brought upon agreements alleged by the plaintiff to have been made by defendant through its bond salesman that it would repurchase the bonds at cost, if requested.

The orders for the bonds were all taken by Charles T. Mather, a bond salesman of defendant at its Philadelphia branch house.

The case was tried February 17-18, 1925.

At the trial Peirson testified to the purchase of the $10,000 Whitmer bonds. A question being asked him (R., 14) as to what Mather, the bond salesman, had said to him at the time of the transaction, defendant's counsel objected on the ground that the agent's authority must first be proved. Upon plaintiff's counsel offer (R., 16), to follow Peirson's testimony as to the transaction with proof of the authority of Mather, the salesman, the Court said:

> "I will overrule the objection in view of the offer of proof, and pass on the sufficiency of the evidence after the evidence is in."

An exception for the defendant was noted. (It is not involved here.)

Peirson then testified that when he purchased the Whitmer bonds, Mather said to him (R., 16):

> "You cannot lose on them. Any time you wish A. B. Leach & Company will take them off your hands at the price you paid for them."

This transaction was on June 19, 1920.

Peirson testified that on September 23, 1920, he bought from defendant $20,000 of Massachusetts Oil bonds, and that at the time of this purchase Mather said to him (R., 19):

> "You cannot lose on them. Any time you wish A. B. Leach & Company will take them off your hands at the price you paid."

He testified that on February 28, 1921, he bought $10,000 of National Oil bonds and that at the time Mather said to him (R., 24):

> "You cannot lose on them. A. B. Leach & Company at any time you wish will take them off your hands at the price you paid for them."

The only evidence as to the authority of the agent to bind his principal was the following:

Peirson then testified that on May 9, 1921 (seven and a half months after he bought the Massachusetts oil bonds), he wrote the defendant a letter in these words (R., 36). It referred only to that one block of bonds.

> "Messrs. A. B. Leach & Co.,
> 115 South Fourth Street,
> Philadelphia.
> Dear Sirs:
>
> When I purchased from you the Mass. Oil & Ref. Co. Bonds it was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98.
>
> I have need of some money and will avail myself of this privilege.
>
> When shall I deliver them to you.
>
> Very truly yours,
>
> WALTER PEIRSON."

He testified that he typed it himself and addressed the envelope and gave it to his clerk, Stinger, to copy and mail.

Peirson was then withdrawn and Stinger was sworn (R., 27).

The defendant was called upon to produce this letter. Defendant's counsel responded that it had never been received and, therefore, he could not produce it.

Stinger then testified that Peirson had brought him the letter and the addressed envelope and that he copied it in a press-copy book and "mailed it" (R., 28).

The copy shown to the witness was on a sheet apparently cut from a press-copy book. Stinger testified that "to the best of his knowledge and belief" that sheet was in the book when he copied it.

A copy of the letter of May 9, 1921, was then offered in evidence (R., 36).

Counsel for defendant objected on the ground that the letter was self-serving:

> "THE COURT: Of course it is a self-serving document but it may become something else if it is received by the defendant."

The objection was overruled and the letter was admitted. An exception was noted for the defendant.

This ruling is covered by the Second Assignment of Error (R., 142).

Mr. Peirson then testified (R., 37), that on May 10, 1921, he saw Mather and Mather arranged to have A. B. Leach & Company lend him $15,000 on his (Peirson's) note with the $20,000 of Massachusetts Oil bonds as collateral, the identical bonds in suit. This loan was made. The note was dated May 11, 1921.

For defendant, Mather, the bond salesman (R., 87, 89), denied having made any of the alleged repurchase agreements. He also testified (R., 90) that his only authority from his house was to take orders for bonds and report them to his company.

Mr. Miller, the vice-president of the defendant, corporation and the head of the Philadelphia branch for seventeen years (R., 100), testified (R., 100) that Mather had no other authority than to take orders for bonds and report them to the house and (R., 101) that he had never authorized Mather to make such repurchase agreements.

Mr. Miller (R., 102) and Mr. Doebler (R., 120) both testified that the defendant had never received the letter of May 9.

Doebler was assistant treasurer (R., 119) and had charge of the incoming mail (R., 120).

The plaintiff's note for $15,000 upon which he had borrowed from the defendant with the $20,000 Massachusetts Oil bonds as collateral security not having been paid, it was set up as a counterclaim. It was admitted to be due.

The Court charged (R., 130):

> "If A. B. Leach & Company received that letter and had notice that their agent had made this agreement and failed to disaffirm the statement made by Mr. Peirson as to what their agent had done or what Mr. Peirson said he had done, then you would be justified in finding that A. B. Leach & Company acquiesced in the agreement made by their agent and that he had authority to do what Mr. Peirson said he had done."

Also (R., 131):

> "If you find that fact [receipt of the letter] against the plaintiff then there is not sufficient evidence in the case to justify any finding on your part that the defendant's agent had the authority which the plaintiff contends he had, because the plaintiff has undertaken to establish the burden put upon him of proving the authority by the testimony of which this letter is the central and controlling piece of evidence."

Inasmuch as the only evidence that the defendant's salesman had authority to make the alleged contracts consisted (without question) in the unanswered self serving letter of May 9, defendant's counsel requested the court to give binding instructions to find a verdict for the defendant (R., 133).

This was refused. Third Assignment of Error (R., 142).

The jury found a verdict for the plaintiff for $14,726.25, being the amount paid for all the bonds ($39,250) less the then value of the bonds ($11,500) and after deducting the counterclaim of $15,000.

Motions for a new trial and for judgment N. O. V. were made and refused and a judgment for plaintiff was entered on the verdict.*

Thereupon the case was taken by writ of error to the Circuit Court of Appeals, which affirmed the judgment of the District Court. The essential part of its opinion is as follows (R., 148):

> "By the finding of the jury, the question of receipt of the letter by A. B. Leach & Company, and their failure to disaffirm it are established in the plaintiff's favor and no error is shown in the verdict unless the Court erred in receiving the letter in evidence. If it was so in error, it follows that the defendant was entitled to binding instructions. Strong objection is made to the admission of the letter, that it was inadmissible, because self-serving. The Court recognized that, standing by itself, the statements of the letter were self-serving and could not affect Leach & Company, and so instructed the jury, saying, as quoted above, that if Leach & Company did not receive it, 'the plaintiff has failed in the proof of authority on the part of Mr. Mather to do what Mr. Peirson claimed he did in making the contract.' On the other hand, if this letter, self serving though it be, was received by Leach & Company, then in the peculiar circumstances of this case the more self serving it was in its assertions, the more insistently it called for disaffirmance by Leach & Company, and if not disaffirmed and repudiated, its self-asserting statements created an acquiescing and consenting sit-

*Although the letter in question referred only to the Massachusetts Oil bonds, yet the trial Court sustained a verdict on all three blocks of bonds

uation against Leach & Company from which a jury might infer that Mather had been authorized to make the statements, or, that having made them, Leach & Company had ratified them. Being pertinent and evidential on the question of ratification, we are of opinion the Judge committed no error in admitting the letter."

This was in effect to hold:

That if the defendant did not receive this letter, the plaintiff had no case.

That if the defendant did receive the letter, then the defendant was bound to answer and repudiate it; otherwise the jury might infer that the agent had had authority to make the contracts in suit.

That the letter was properly admitted in evidence.

A petition for a rehearing was refused without an opinion.

SPECIFICATIONS OF ERROR INTENDED TO BE RELIED UPON.

(R., 142-145.)

2. The learned trial Judge erred in admitting in evidence the letter of May 9, 1921, as follows (R., 36):

"MR. BROWS: I offer in evidence letter of May 9th, 1921, as represented by this copy.

MR. HENDERSON: Objected to.

THE COURT: Well, that is a question for the jury. The credibility of the witnesses is for the jury.

MR. HENDERSON: There has been no testimony that this particular letter was mailed. Mr. Stinger did not say so on the stand.

THE COURT: As I recall it he did say he mailed the letter.

MR. HENDERSON: I further object to this letter as a self serving document, and I ask that it be handed to your Honor to pass upon.

THE COURT: Of course it is a self-serving document but it may become something else if it is received by the defendant.

(Objection overruled. Exception noted for defendant by direction of the Court.)"

3. The learned trial Judge erred in refusing defendant's motion for a directed verdict in favor of defendant, as follows (R., 133):

"MR. HENDERSON: I withdraw all my requests for charge except No. 1.

THE COURT: The point for binding instructions is declined and an exception granted to defendant."

4. The learned trial Judge erred in admitting in evidence the letter of May 9, 1921 (R., 36), and instructing the jury thereon, as follows (R., 131):

"If you find that that letter was written and mailed and received by A. B. Leach & Company, then that would be notice to A. B. Leach & Company of the fact that their agent had made the agreement which is in controversy here, and if they had such notice and they failed to deny that their agent had such authority or that such an agreement was made, then you would be justified in considering that they acquiesced in what the agent had done and that the agent therefore had authority to do it."

although the plaintiff's second purchase of Massachusetts Oil bonds, the Whitmer and the National Oil bonds were not mentioned nor referred to in the said letter.

8. The learned trial Judge erred in entering judgment for the plaintiff and against the defendant (R., 133).

ARGUMENT.

Summary of Points.

1. The trial Judge in ruling upon the admissibility of the letter of May 9, 1921, was bound under the Conformity Acts by the decisions of the highest court of Pennsylvania.

2. By the uniform decisions of the highest court of Pennsylvania, an unanswered self serving letter is not admissible in evidence as proof of the truth of facts set forth therein. Therefore, the trial Judge erred in not rejecting the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment.

3. The trial Judge erred in not directing a verdict for the defendant and it was error on the part of the Circuit Court of Appeals to affirm the judgment.

4. All the authorities in all jurisdictions have held that a self serving letter, unanswered, is not admissible in evidence as proof of the facts set forth in it. It was therefore error in the trial Judge not to reject the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment of the District Court. The entire record is now before this court with power to decide the case as presented to the Circuit Court of Appeals.

5. There is a lack of uniformity among the decisions of the various Circuit Courts of Appeals as to whether or not, under the Conformity Acts, the Federal Courts in the trial of a common law case, are bound to follow the rules of evidence of the highest court of the state in which the trial is held. It is important that the question be put beyond doubt.

6. Some observations as to *Swift v. Tyson*, 16 Pet. 1.

Point 1.

That the trial Court was bound, under the Conformity Acts, by the decisions of the highest court of Pennsylvania on rules of evidence and erred in not rejecting the letter.

The two following cases appear to be binding authorities:

Bucher v. Cheshire R. Co., 125 U. S. 555, 583 (1888).

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts.

"*The principle also applies to rules of evidence.* In *Ex parte Fisk*, 113 U. S. 713, 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' See also *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66."

Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228 (1903).

"The 'laws of the several states' *with respect to evidence* within the meaning of this section [R. S. Sec. 721] apply not only to the statutes but to

---

The Conformity Act: "The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

(Section 34, Act of September 24, 1789; R. S. Sec. 721; Comp. Stat. Sec. 1537; New Code, Sec. 725.)

the decisions of their highest courts. *Bucher v. Cheshire Railroad Co.*, 125 U. S. 555, 582; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan v. Bindley*, 1 Wall. 66." *

This rule has been applied in the following cases in various Circuit Courts of Appeals.

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420 (C. C. of A. 1st Circ.).

"Ordinarily the rules of evidence and the law of evidence of the state prevail in the federal courts sitting within the limits of the state. *Ryan v. Bindley*, 1 Wall. 66; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583; *Ex parte Fisk*, 113 U. S. 713, 720; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 228. In *Conrad v. Griffey*, 16 How. 38, 47, the rule as generally established is applied, with the remark, 'The rule of evidence is a salutary one, and *cannot be dispensed with in the courts of the United States.*'"

Myers et al. v. Moore Kile Co., 279 Fed. 233, 237 (C. C. of A. 5th Circ.).

"I concur in the judgment of the court upon the single ground that the sufficiency of the proof offered has been settled as a rule of evidence in Texas by the Supreme Court of that state. *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221."

---

*Ex parte McNeil, 13 Wall. 236, 243:

"A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Home v. Gray, 16 Wall. 203, 221:

"A party going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality."

American Issue Pub. Co. et al. v. Sloan, 248 Fed. 251, 253 (C. C. of A. 6th Circ.).

"The result of the Conformity Act (Rev. Stat. Sec. 914; Comp. Stat. 1916, Sec. 1537), the Rules of Decision Act (Rev. Stat. Sec. 721; Comp. Stat. 1916, Sec. 1538), and the Competency of Witnesses Act (Rev. Stat. Sec. 858; Comp. Stat. 1916, Sec. 1464), is to make state statutes relating to the competency of witnesses and the competency of testimony, as well as the state law of evidence generally, binding on the federal courts sitting within such state, except where in conflict with the federal Constitution, statutes, or treaties."

Franklin Sugar Co. v. Luray Supply Co., 6 Fed. (2d) 218, 220 (C. C. of A. 4th Circuit.).

This was an action to recover damages for breach of a contract for the future delivery of sugar.

"The fact that this court is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United States (R. S. Sec. 721, 914 [Comp. Stat. Sec. 1538, 1537]), as by the decisions of its courts. *McNeil v. Holbrook*, 12 Pet. 84; *Vance v. Campbell*, 1 Black 427; *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221; *Central Vermont R. Co. v. White*, 238 U. S. 507; *Hinds v. Keith*, 57 F. 10; *Stewart v. Morris*, 88 F. 461; *Pooler v. United States*, 127 F. 519; *American Agricultural etc. Co. v. Hogan*, 213 F. 416; *American Issue Pub. Co. v. Sloan*, 248 F. 251; *Myers v. Moore-Kyle Co.*, 279 F. 233."

Point 2.

By the uniform decisions of the highest court of Pennsylvania, an unanswered, self-serving letter is not admissible in evidence as proof of the truth of facts set forth in it. Therefore, the trial Judge erred in not rejecting the letter of May 9th, 1921, and the Circuit Court of Appeals erred in affirming the judgment.

THE PENNSYLVANIA CASES.

Fraley v. Bispham, 10 Pa. 320 (1849). Gibson, *C. J.*, Rogers, Burnside, Coulter and Bell, *JJ.*

This was an action on a warranty in a sale of tobacco. A letter from the vendee to the vendor stating that the goods were "purchased under a guarantee that the quality of the article was superior" and that the vendor "would reimburse us for any loss we might sustain by the shipment," with a claim of the amount of the loss, and a second letter to the same effect, were rejected. They were written, respectively, about a year and about three months before suit was brought. The plaintiff was non suited.

In the Supreme Court, the judgment was affirmed.

Holler v. Weaver, 15 Pa. 242 (1850). Gibson, *C. J.*, Rogers, Coulter, Bell and Chambers, *JJ.*

This was the case of an answered letter, which, having been answered, was admitted in evidence, but in delivering the opinion of the Court, Rogers, *J.*, said:

> "The letters were admitted as a connected whole; no objection being made to any particular part of the correspondence. *Had the defendants taken no notice of the plaintiff's letter*, which no doubt would have been the case had his present

counsel been at his elbow, *the exception would avail here.*"

This constitutes a clear recognition that the settled rule at that time was that a self serving letter, received but not answered, is not admissible as evidence in favor of the writer as proof of the truth of the statements contained in it.

The question does not appear to have come up again for some years.

It arose again in

Dempsey v. Dobson, 174 Pa. 122, 132 (1896).

This was trespass for the wrongful taking of color books.

The plaintiff had been in the employ of the defendant as a color mixer in the manufacture of carpets. When he left the defendant's employ the defendant refused to permit him to take away his color books containing his formulæ for color mixing. About a month after his employment ceased the plaintiff wrote the defendant a long and argumentative letter, setting forth his grievance of being deprived of valuable trade secrets, worked up by him while in defendant's employ. This letter was admitted under objection. There was a verdict and judgment for the plaintiff.

> WILLIAMS, *J.*: "The first assignment must also be sustained. The letter written after the plaintiff's color books had been returned to him demanding that the copy that had been made should be given to him was inadmissible. It was an argumentative presentation of his view of his rights as an employee and of the grievance of which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf and was no more admissible because reduced to writing than it would have been if delivered orally. The point is substantially ruled in *Fraley v. Bispham*, 10 Pa. 320."

Kann v. Bennett, 223 Pa. 36, 47 (1909).

This was an action by an owner against a contractor for failure to complete a building contract.

> "In attempting to establish the contention of the plaintiff in this respect there were offered and, as counsel for defendant claim, erroneously admitted in evidence, two letters from the architect to the defendant, written during the progress of the work, in which complaint was made of the unsatisfactory and dilatory way in which it was alleged the defendant was proceeding. The letters set forth a number of specific grounds of dissatisfaction. Under the contract, the architect was made the agent of the owner, and these letters must therefore be regarded as the letters of the plaintiff, written in his behalf by his agent. They set forth an argumentative presentation of the plaintiff's contention, and there seems to be nothing in the record to show that they were actually received, or were ever replied to in any manner by the defendant. The letters therefore amounted to nothing more than declarations by the plaintiff in his own behalf, and as such they should not have been admitted in evidence: *Dempsey v. Dobson*, 174 Pa. 122; *Huckestein v. Kelly & Jones Co.*, 170 Pa. 201; *Fraley v. Bispham*, 10 Pa. 320."

This rule, in the opinion of counsel, has invariably been followed in Pennsylvania. There appears to be no reported case to the contrary.

Point 3.

The trial Judge erred in not directing a verdict for the defendant as requested and it was error on the part of the Circuit Court of Appeals in affirming the judgment of the District Court (3d Assignment R., 133).

The letter in question was the plaintiff's only evidence that the bond salesman had authority to make

the alleged contract to buy back the bonds, if requested. If that letter was inadmissible, then the plaintiff's case fell and it was error not to direct a verdict for the defendant, as requested by defendant's counsel.

Point 4.

All the authorites in all jurisdictions have held that a self-serving letter, unanswered, is not admissible in evidence as proof of the facts set forth in it. It was therefore, error in the trial Judge (apart from the Conformity Acts) not to reject the letter of May 9, 1921, and the Circuit Court of Appeals erred in affirming the judgment of the District Court.

This point is urged independently of Points 1 and 2. The entire record is before this Court with power to decide the case as presented to the Circuit Court of Appeals on the writ of error. (*Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257.)

Additional Cases on Self Serving Letters, Unanswered.

THE FEDERAL CASES.

Packer v. United States, 106 Fed. 906 (C. C. A., 2d Circ.), Wallace, Lacombe and Shipman, *C. JJ.*

The plaintiff in error had been convicted of a fraud on the mails. Moody, who was one of the victims of the accused, wrote a letter to the accused after the offenses charged in the indictment had been committed.

WALLACE, *C. J.*:

"It is urged that the last Moody letter was competent because it was a reply to a letter from the accused soliciting further remittances from

Moody. The contention is fallacious unless it can be maintained as a correct legal proposition that a request admits in advance the statements made in response. This would be a very dangerous doctrine, and finds no color of support in the law of evidence. If only that part of the reply refusing to make further remittances had been read, no harm would have been done; but, as has been stated, the letter was, in substance, *a narrative of past events, of which there was no other evidence*, and an argument to demonstrate that the accused had been guilty of a scheme to defraud Moody. It is also urged that that letter was admissible as a tacit admission by the accused of the truth of its statements, it having been proved that the accused did not reply to it. Admissions, of course, may be inferred from silence as well as from express statements, *but it has been uniformly held by the courts that the failure to reply to a letter is not to be treated in a criminal or in a civil action as an admission of the contents of the letter.*"

. . . . . .

"It [silence as an admission of facts] could not be applicable to any case where the letter only tends to support a charge of guilt, and where it has been followed by no action, and no response on the part of the person receiving the letter. *The same principle has been repeatedly applied to civil actions. Faulie v. Denton*, 3 Car. & P. 103; *Gaskill v. Skene*, 14 Ad. & E. (N. S.) 664; *Learned v. Tillotson*, 97 N. Y. 1; *Bank v. Delafield*, 126 N. Y. 418; *Gray v. Ice Cream Co.*, 162 N. Y. 397."

Rumble v. U. S., 143 Fed. 772, 780 (C. C. A. 9th Circ.).

"It will be conceded that a letter written to the defendant, which was *not answered by him*, would not be admissible in evidence as tending to show an implied admission on his part of the truth of the statements contained in the letter."

Citing *Packer v. U. S.*, 106 Fed. 906.

Woolsey v. Haynes, 165 Fed. 391.

Van Devanter and Adams, *C. JJ.*, and Phillips, *D. J.*

Self-serving statements made by a party in letters written after he had reason to believe a controversy was impending, are inadmissible in his behalf (syllabus).

Thrush v. Fullhart, 210 Fed. 1, 6 (C. C. A., 4th Circ.).

"We are further of opinion that the plaintiff's letters of January 20 and 29, 1912, were improperly received in evidence. The declarations of a party in his own interest are not ordinarily admissible, and these letters seem to be essentially of that character. They cannot fairly be regarded as a part of the correspondence between the parties, for they are not in reply to anything defendant had written, nor were they answered by him. They were written nearly three months after the incident with which they are sought to be connected—the return of plaintiff's watch—and one of them certainly, the other apparently, after she had consulted with counsel and had in contemplation a suit against defendant. The fact that he made no reply to these communications did not permit an inference of assent on his part to anything which plaintiff charged against him or claimed for herself, for the law is well settled that failure to answer a letter, under such circumstances as are here disclosed, cannot be regarded as an admission by the party to whom the letter is addressed. In our judgment, *the letters in question are self-serving declarations which should have been excluded as irrelevant and incompetent.*"

Harris v. Egger, 226 Fed. 389 (C. C. A. 6th Circ.).

In an action for fraudulent misrepresentation made on purchasing shares of stock, letters written by plaintiff, which were not in contradiction of his testimony, as well as those by defendant, which contained *self serving declarations*, were properly excluded. (Syllabus.)

Morris v. Norton, 75 Fed. 912, 924, 925.

Taft, *C. J.*, after examining sundry authorities on unanswered letters said:

> "The better supported rule, probably, is that unanswered letters are ordinarily not evidence against the person addressed, as admissions of the truth of statement contained therein. . . . (citing cases), but the rule has some exceptions. *Hayes v. Kelly*, 116 Mass. 300; *Wiggins v. Burkham*, 10 Wall. 129.
>
> "After all, it comes to this: that unanswered statements in letters are seldom to be regarded as admissions by the person addressed, but that exceptional circumstances may justify the court in submitting them to the jury *with a proper caution*."
>
> "In the case at bar the letters relied upon cannot properly be said to have been unanswered. They were part of a running correspondence . . . ."

CASES IN VARIOUS STATE COURTS.

Kumin v. Finz, 229 Mass. 75.

Letters written by plaintiff to defendant before certain renewal notes in suit were endorsed. Held inadmissible.

> "The rule is well established that a person to whom a letter is addressed ordinarily is not re-

quired to make any reply, and failure to answer it is no evidence of the truth of the facts therein stated, because such evidence would be in violation of the rule that a party *cannot make evidence for himself* by his own declarations. It was held in *Wiedemann v. Walpole* (1891) 2 Q. B. 534, that in an action for breach of promise of marriage, the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, was not corroborative of the plaintiff's testimony in support of such promise.

"In the case at bar, the letters offered in evidence were not a part of mutual correspondence between the parties relating to the notes. . . . That such evidence is inadmissible has often been held by this court. *Smith v. Abbott*, 221 Mass. 326; *Pye v. Perry*, 217 Mass. 68; *Fearing v. Kimball*, 4 Allen 125; *Callahan v. Goldman*, 216 Mass. 234."

Gray v. Kaufman, etc., Co., 162 N. Y. 388.

Action for rent.

A tenant's assent to a new letting of premises he has abandoned will not be implied from his failure to answer a letter from his landlord, saying that he would relet them on the tenant's account.

Citing *Learned v. Tillotson*, 97 N. Y. 1; *Bank v. Delafield*, 126 N. Y. 418; *Thomas v. Gage*, 141 N. Y. 506.

Vicle v. McLean, 200 N. Y. 260.

Cullen, *C. J.*:

"It would be difficult to imagine a declaration more self serving than that contained in this statement. *It was purely a narrative of past transactions.* The theory on which it was admissible in evidence seems to be that the defendant's failure, upon the receipt of the statement, to deny its

truth was in the nature of an admission. It is well settled that this is an erroneous view of the law."

Chicago v. McKechney, 205 Ill. 372.

Action for the amount claimed to de due on the construction of a tunnel.

Held: "That a letter written by a party to the other party is not admissible in evidence in his favor, except to show demand or notice, and the fact that such letter remained unanswered does not tend to show acquiescence on the part of the party receiving it." Citing 3 C. & P. 63; 29 Vt. 119; *Bank v. Delafield*, 126 N. Y. 410; *Learned v. Tillotson*, 97 N. Y. 1; *Talcott v. Harris*, 93 N. Y. 567; *Fearing v. Kimball*, 4 Allen 125. (Syllabus.)

To the same effect are the following cases:

State v. Howell, 61 N. J. L. 142;
Boggs v. Stucker, 93 Md. 100;
Sievers v. Cleveland Coal Co., 158 Ia. 574;
State Bank v. McCabe, 135 Mich. 479;
Hammond v. Beeson, 112 Mo. 190;
Hall v. Pratt, 29 Vt. 119.

ENGLISH CASES.

Richards v. Gellatly, L. R. 7 C. P. 127, 131.

"It seems to have been at one time thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it. But that notion has been long since exploded and the absurdity of acting upon it demonstrated."

Per Willes, J. Byles, Brett and Grove, JJ., concurred.

Wiedemann v. Walpole, 2 Q. B. 534 539 (1891).

This was a suit for breach of promise of marriage. The woman wrote to the man claiming that he had promised to marry her. The letters were admitted at the trial before Pollock, *B.*, and a jury. But in the Court of Appeal it was *held*:

> "The mere fact that defendant did not answer letters written to him by plaintiff in which she stated he had promised to marry her, was held no evidence corroborating the plaintiff's testimony in support of such a promise within the meaning of the statute."

Bowen, *L. J.*:

> "It would be a monstrous thing if the mere fact of not answering a letter which charges a man with some misconduct was held to be evidence of an admission of guilt."

Lord Esher, *M. R.*, Bowen and Kay, *L. JJ.*

Thomas v. Jones, (1920) 2 K. B. 399.

Bastardy. The woman, after the birth of a child, wrote a letter to the appellant in which she said that he was the father of her child and asked him if he intended to provide for it. He did not answer the letter, although he received it.

Lord Reading, *C. J.*:

> "I fully agree with the observation of Lord Esher, *M. R.*, in *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, 538, that the mere fact of not answering a letter containing an assertion is no evidence whatever of an admission of the truth of the assertion."

Thomas v. Jones, (1921) 1 K. B. 22 (C. of A.).

The judgment below was reversed upon the ground that there was no corroborating evidence sus-

taining the woman's story as required by the Bastardy Act.

Scrutton, *L. J.*:

> "I quite agree with what was said in *Wiedemann v. Walpole*, (1891) 2 Q. B. 534, and what has been said in the present case, that the mere fact of receiving a statement by letter is not enough to justify justices or a jury in finding corroboration."

ROMAN LAW.

The rule is as old as the Roman law. *Scriptura pro scribente nihil probat.* L. 10, D. XXII. 5.

It has been said that a self-serving letter may be admitted if it is a part of a correspondence. But this letter was not that.

It may be admitted if it is a notice or demand. It certainly was not a notice. Nor was it a demand. Such a letter, if it contain a notice or a demand, can be rendered admissible only when proof of a notice or a demand is a necessary prerequisite of the plaintiff's case. But no notice or demand was necessary to be proved here.

The letter was, in fact, a mere statement of the alleged transaction from the writer's point of view. As was said by Wallace, *C. J.*, in *Packer v. U. S.*, 106 Fed. 906 (*supra*, p. 171), "it was a narrative of past events, of which there was no other evidence."

Even if, in addition to its "narrative of acts," it had contained a demand, essential as such to the proof of the plaintiff's case, it would have been the duty of the trial Judge, while admitting the demand part of the letter, *to have cautioned the jury not to consider the self-serving statement of facts contained in it*, and to charge them that that statement was not evidence to prove that the defendant's bond salesman had authority on behalf of his principal to make the alleged con-

tracts of repurchase, or that the defendant had ratified the salesman's act. This appears in

Gaskill v. Skene, 14 Ad. & E. (N. S.) 664.

The letters admitted there amounted to little more than *a demand*. So far as they tended to set forth the facts of the plaintiff's case, they were held to be inadmissible.

Coleridge, *J.*, criticized what, he said, "may be a mischievous attempt to manufacture evidence by making a tricky statement of the party's case and then offering it in evidence as having been served on the other party as a demand." *

Allan v. Peters, 4 Phila. 78 (1860).

This case came up in the old District Court of Philadelphia, an able and experienced court long presided over by Judge Sharswood and Judge Mitchell, both of whom were afterwards Chief Justices of the Supreme Court of Pennsylvania, and Judge J. I. Clark Hare. It tried for many years practically all of the *nisi prius* cases in Philadelphia. Judge Stroud was considered by the Philadelphia Bar as an able *nisi prius* judge.

Stroud, *J.*, in setting aside the verdict, said:

> "We think this decision places the subject on its true grounds; and the result of the whole of the cases seems to be, that an unanswered letter offered by the party by or for whom it was written, if it be restricted to making a *demand where this is requisite, or giving a notice merely*, is always admissible; that, if it contain statements of a different nature, and evidently framed for a different

*In citing this case, no reflection is intended. It is cited only to show the danger of a rule admitting such a letter.

purpose, and these derive no support from other evidence in the cause, it should be wholly excluded; but, if the statements do not go beyond what is necessary to render the *demand or notice* intelligible, or there is other consentaneous evidence, the whole may be submitted to the consideration of the jury. But that it is the duty of the court, whenever such a letter is received, to *scan its contents rigorously*, and make such discriminating observations to the jury that they may be prevented from giving undue weight to what has been so written."

Point 5.

There is a lack of uniformity in the decisions of the various Circuit Courts of Appeals as to whether or not, under the Conformity Acts, the Federal Courts are, in the trial of a common law case, bound to follow the rules of evidence of the highest court of the state in which the trial is held.

The cases in Circuit Courts of Appeals which follow refused to apply State decisions on rules of evidence, or, at least, considered that the question had never been passed upon by this Court.

Chicago & N. W. Ry Co. v. Kendall, 167 Fed 62, 64. Sanborn and Hook, *C. JJ.*, Amidon, *D. J.* (8th Circ.)

The question there was whether the court had the power to compel the plaintiff to submit to a physical examination. It was urged that the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia. 378, had held that at common law and independently of statute, the court had power in an action for personal injuries to compel the plaintiff to submit himself to the examination of physicians.

The opinion cites *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, and *Camden Railway Co. v. Stetson*, 177

U. S. 172, as holding that Federal courts did not possess such power. It held that on a question of practice the decisions of state courts are not binding upon Federal courts and that it must follow the decisions of the Supreme Court of the United States in the Botsford case.

The court then discussed the case as involving a rule of evidence, saying that "the point had never been directly involved and passed into judgment as to state decisions touching a general common law rule of evidence."

The opinion quoted from the opinion in *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221:

> "The laws of the several states with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts."

but proceeded to say that

> "the language just quoted was not necessary for the determination of the question before the court."
>
> "We do not consider the question as settled by any decision of the Supreme Court of the United States."

The opinion (p. 70) gives the following reasons for this decision:

> "Such a practice would, in our judgment, result in unnecessary labor and perplexity for federal judges in the trial of causes. It is the duty of such judges to be familiar with the decisions of the national courts. The rules of evidence are a part of the law that must in the main be carried in the mind of the trial judge. Such questions constantly recur, and must be promptly decided.

decisions in various Circuits and with all other decisions which counsel have found.

As against this mass of uniform authorities we ask attention to the essential part of the opinion in the Circuit Court of Appeals in the present case (R.):

> "On the other hand, if this letter, self-serving though it be, was received by Leach & Company, then in the peculiar circumstances of this case *the more self serving it was in its assertions, the more insistently it called for disaffirmance by Leach & Company*, and if not disaffirmed and repudiated, its self asserting statements created an acquiescing and consenting situation against Leach & Company from which a jury might infer that Mather had been authorized to make the statements, or, that having made them, Leach & Company had ratified them. Being pertinent and evidential on the question of ratification, we are of opinion the Judge committed no error in admitting the letter."

There do not appear to be any "peculiar circumstances" which take this case out of the uniform line of cases. The learned Court has not set them forth.

The above language of the Circuit Court of Appeals refers to the letter as being a "ratification" of the alleged repurchase agreements.

But that is to reverse the argument and to use the legal effect of the letter if admitted in evidence as an argument in favor of its admission. Clearly, the admissibility of the letter must first be established before we come to consider its legal effect. The logic of the Court appears to be faulty.

If this letter were admissible upon the ground that it was a ratification, then, on the same ground, half the cases in which unanswered self serving letters were rejected would have been cases of ratification and the letters would have been admitted.

If Peirson had added to his letter: "If you do not answer this letter, I shall take it to be a ratification of

your agent's authority", he could not in such a way have made evidence for himself.

The plaintiff's counsel in the Circuit Court of Appeals argued that the letter *was* answered, that is to say, that Peirson testified (R. 97) that Mather, the agent, called on him the day after the date of the letter and discussed with him a loan of $15,000 to plaintiff with the Massachusetts bonds as collateral. But nothing was said by either of them at this interview about this letter or about any repurchase agreements. (R. 111.)

This contention is rather strained. And it is not proved that the agent had authority to "answer" the letter by calling on the plaintiff.

Besides, the Circuit Court of Appeals disregarded this contention and based its decision entirely on the question of the admissibility of an *unanswered*, self-serving letter.

We submit that the case presented in this petition raises a question of uniformity of decisions which is one of the usual grounds for the grant of the writ. A question of evidence which has been passed upon by the highest Courts in a score of jurisdictions and which constantly arises in the trial of cases, appears to be a case of general importance. That it relates to a rule of evidence does not lessen its importance. Rules of Evidence are often quite as important in the administration of justice as rules of substantive law.

> "The rules of evidence are of great importance, and cannot be departed from without endangering private as well as public rights." Story, *J.*, in *Nicholls v. Webb*, 8 Wheat. 326, 332.

Of this the case at bar is a notable illustration. This action to recover nearly $28,000 depended solely upon the admissibility in evidence of this unanswered, self-serving letter. If rejected, the plaintiff would have had no case (admittedly).

The Conformity Acts.

*Under These Acts Federal Courts Are Bound Upon Questions of Evidence to Follow the decisions of the Highest Court of the State in Which the Trial Is Held.**

Bucher v. Cheshire R. Co., 125 U. S. 555, 583 (1888).

"It is also well settled that where a course of decisions, whether founded upon statutes or not, have become rules of property as laid down by the highest courts of the State, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal Courts.

"*The principle also applies to rules of evidence.* In *Ex parte Fisk*, 113 U. S. 713, 720, the court said: 'It has been often decided in this court that in actions at law in the courts of the United States the rules of evidence and the law of evidence generally of the State prevail in those courts.' See also *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 66."

Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 228 (1903).

"The 'laws of the several states' *with respect to evidence* within the meaning of this section [R.

---

*See note *M'Neil*, 13 Wall. 236, 243.

"A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality."

Dunn v. Coon, 16 Wall. 203, 221.

"A party going into a National court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality."

S. Sec. 721] apply not only to the statute *but to the decisions of their highest courts. Bucher v. Cheshire Railroad Co.*, 125 U. S. 555; *Ex parte Fisk*, 113 U. S. 713, 720; *Ryan v. Bindley*, 1 Wall. 66."

Notwithstanding these two decisions, there seems to be, at least in two of the Circuits, uncertainty of decision as to the scope and effect of the Conformity Acts. We refer to the two following cases:

Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 64. Sanborn and Hook, *C. JJ.*, Amidon, *D. J.* (8th Circ.).

The question was whether the court had the power to compel the plaintiff to submit to a physical examination. It was urged that the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Ia. 378, had held that at common law and independently of statute, the court had power in an action for personal injuries to compel the plaintiff to submit himself to the examination of physicians.

The opinion cites *Union Pac. R. Co. v. Botsford*, 141 U. S. 250, and *Camden Railway Co. v. Stetson*, 177 U. S. 172, as holding that Federal courts did not possess such power. It held that on a question of practice the decisions of state courts are not binding upon Federal courts and that it must follow the decisions of the Supreme Court of the United States in the Botsford case.

The court then discussed the case as involving a rule of evidence, saying that "the point had never been directly involved and passed into judgment as to state decisions touching a general common law rule of evidence."

The opinion quoted from the opinion in *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221:

> "The laws of the several states with respect to evidence within the meaning of this section apply not only to the statutes, but to the decisions of their highest courts."

and proceeded to say that

> "the language just quoted was not necessary for the determination of the question before the court."

And cited U. P. R. Co. v. Yates, 79 Fed., as holding that state decisions on evidence "are not obligatory on Federal Courts."

* * * * * * * * *

> "We do not consider the question as settled by any decision of the Supreme Court of the United States."

* * * * * * * * *

> "A somewhat careful examination has failed to discover any instance in which a federal court has treated a local decision on a question of evidence as a rule of law of controlling force in opposition to a decision of the Supreme Court of the United States."

* * * * * * * * *

> "If, therefore, the question involved in the present case be regarded as a question of evidence, we are of the opinion that the decision of the Supreme Court in *Union Pacific v. Botsford*, 141 U. S. 250, is binding upon federal courts, and, if applicable, should be the rule of decision in the present case, notwithstanding the decision of the Supreme Court of Iowa in *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 378."

E. I. du Pont de Nemours & Co. v. Tomlinson, et al., 296 Fed. 634, 642.

C. C. of A., 4th Circ.

These were suits brought by the plaintiff in error against defendants in error to recover the value of shipments of nitrate of soda claimed by it. The question arose as to the admissibility in evidence of records of the railroad company as evidence for the ship from which a particular car was loaded, without the production of the employee who made the entries in the railroad company's records.

It was contended that whatever might be the general rule of evidence applicable to cases of this kind, this case should be governed by the law of evidence obtaining in the state courts of North Carolina, under which this documentary evidence was inadmissible, and it was claimed that under the Conformity Act the state law of evidence was binding upon the Federal courts sitting within the state.

In reversing the judgment, the opinion of the court said:

> "It cannot be said that this rule is well settled by the decisions of the federal courts. It has been decided, notwithstanding the federal statutes above cited, that the decisions of state courts relating to general commercial law, or to the law of negligence, are not laws within the meaning of R. S., Sec. 721 (*Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *B. & O. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772), and to the same effect with reference to the law of evidence (*Chicago & Northwestern R. Co. v. Kendall*, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560). On the other hand, there are decisions of the federal courts which hold, without extended discussion, that the law of evidence of the several states, within the meaning of section 721, R. S., applies not only to statutes, but to decisions of their highest courts. *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 23 Sup. Ct. 517, 47 L. Ed. 782; *A. A. Co. v. Hogan*, 213 Fed. 416, 130 C. C. A. 52; *Myers v. Moore* (C. C. A.) 279 Fed. 233, 25 A. L. R. 1

"The principle underlying the distinction between the respect to be given by federal courts to state decisions on commercial law and the law of negligence, on the one hand, and the law of evidence, on the other, has not been clearly enunciated."

It will be convenient to cite the following Federal cases:

American Agricultural Chemical Co. v. Hogan, 213 Fed. 416, 420 (C. C. of A., 1st Circ.).

"Ordinarily, the rules of evidence and the law of evidence of the state prevail in the federal courts sitting within the limits of the state. *Ryan v. Bindley*, 1 Wall. 66; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 583; *Ex parte Fisk*, 113 U. S. 713, 720; *Nashua Savings Bank v. Anglo American Co.*, 189 U. S. 221, 228. In *Conrad v. Griffey*, 16 How. 38, 47, the rule as generally established is applied, with the remark, 'The rule of evidence is a salutary one, and *cannot be dispensed with in the courts of the United States.*"

Myers et al. v. Moore-Kyle Co., 279 Fed. 233, 237 (C. C. of A., 5th Circ.).

"I concur in the judgment of the court upon the single ground that the sufficiency of the proof offered has been settled as a rule of evidence in Texas by the Supreme Court of that State. *Bucher v. Cheshire R. R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221."

American Issue Pub. Co. et al. v. Sloan, 248 Fed. 251, 253 (C. C. of A., 6th Circ.).

"The result of the Conformity Act (Rev. Stat. Sec. 914; Comp. StSat. 1916, Sec. 1537), the Rules of Decision Act (Rev. Stat. Sec. 721; Comp.

Stat. 1916, Sec. 1538), and the Competency of Witnesses Act (Rev. Stat. Sec. 858; Comp. Stat. 1916, Sec. 1464), is to make state statutes relating to the competency of witnesses and the competency of testimony, as well as the state law of evidence generally, binding on the federal courts sitting within such state, except where in conflict with the federal Constitution, statutes, or treaties."

Franklin Sugar Co. v. Luray Supply Co., 6 Fed. (2d) 218, 220 (C. C. of A., 4th Circuit).

This was an action to recover damages for breach of a contract for the future delivery of sugar

"The fact that this court is bound by and should follow the decisions of the highest court of the state on the subject of the admissibility of testimony is in our opinion beyond controversy, and we are required so to do as well by statutes of the United StSates (R. S. Sec. 721, 914; Comp. Stat. Sec. 1538, 1537), as by the decisions of its courts. *McNeil v. Holbrook*, 12 Pet. 84; *Vance v. Campbell*, 1 Black 427; *Conn. Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Bucher v. Cheshire R. Co.*, 125 U. S. 555; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221; *Central Vermont R. Co. v. White*, 238 U. S. 507; *Hinds v. Keith*, 57 F. 10; *Stewart v. Morris*, 88 F. 461; *Pooler v. United States*, 127 F. 519; *American Agricultural etc. Co. v. Hogan*, 213 F. 416; *American Issue Pub. Co. v. Sloan*, 248 F. 251; *Myers v. Moore-Kyle Co.*, 279 F. 233.

"We are not unaware that the Circuit Courts of Appeal for two circuits, the Sixth and the Eighth, have held that the federal courts are not bound to follow the decisions of the highest courts of the state in which they are sitting as to the admissibility of testimony. *Louisville & Nashville Railroad v. McClish*, 115 F. 268; *West Tennessee Grain Co. v. J. C. Shaffer*, 299 F. 197, and *Chicago & Northwestern Railway Co. v. Kendall*, 167 F. 62."

Apparently there is a lack of uniformity in the Federal cases.

Here appears to be ground, it is submitted, for the exercise by the court of its jurisdiction in this case to bring up the record for review.

There is another reason—a far weightier reason—for reviewing this case. It raises a question of the relations of the general Government to the States under our dual form of government. In these days of centralizing tendencies, this subject has become more important than ever before. It is to this court that we must look to maintain the constitutional relations between the United States and the States. The present question is, therefore, one of grave importance for the elucidation and settlement of which it is submitted that the court should not hesitate to issue its writ of certiorari.

The importance of this contention can best be shown by quoting from the dissenting opinion of Mr. Justice Field in *B. & O. R. Co. v. Baugh*, 149 U. S. 368, 402:

> "'We have said,' continues the court in the same case [*The Collector v. Day*, 11 Wall. 113, 124] 'that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.'

"Such being the nature of the judicial department, and the free exercise of its powers being essential to the independence of the States, how can it be said that its decisions as to the law of the State, upon a matter subject to its cognizance, can be ignored and set aside by the courts of the United States for the law or supposed law of another State or sovereignty, be it the general or special law of that State or sovereignty? If a Federal court exercise its duties within one of the States where the law on the subject under consideration is uncertain and unsettled, 'where,' as Chief Justice Marshall said, 'the state courts afford no light,' it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment as it seems just. But no foreign law, or law out of the State, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the State in which the action is pending is settled and certain. A law of the State of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place without a manifest usurpation by the Federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will, in the end 'die among its worshippers.'

. . . . . .

"As said by the Supreme Court of Pennsylvania at an early day—as far back as 1798—'the government of the United States forms a part of the government of each State.' *Respublica v. Cobbett*, 3 Dall. 473. To which the same court, over a half century later, added: 'It follows that its courts are the courts of each State; they administer justice according to the laws of the State as construed and settled by its own supreme tribunal.

This has been more than once solemnly determined by the Supreme Court of the Union to be the rule of their decision, whenever the construction of the Constitution of the United States, treaties, or acts of Congress does not come in question.' *Commonwealth v. Pittsburgh and Connellsville Railroad*, 58 Penn. St. 44."

Binding instructions for defendant should have been given, as prayed, because defendant produced two credible witnesses (the two chief officers in charge of defendant's Philadelphia office) who testified that the letter of May 9th had not been received, against which the plaintiff produced no direct evidence but only evidence tending to prove mailing which created a mere inference that the letter was in fact received.

There was no question of veracity as between witnesses. It was the evidence of the two chief officers of the defendant who testified directly and positively that the letter had not been received. No witness testified that it had been received.

Under the Conformity Acts the trial court was bound by the authority of the decisions in the Supreme Court of Pennsylvania to give binding instructions for the defendant. Those cases are as follows:

Lauger v. Lehigh Valley R. R. Co., 196 Pa. 610, 613.

"When the testimony is not in itself improbable, is not a variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, *the jury is not at liberty to indulge in a capricious disbelief.* If they do so, it is the duty of the court to set the verdict aside. Such cases are exceptional, but this is one of them."

The error assigned was in submitting the case to the jury.

Walters v. American Bridge Co., 234 Pa. 7.

Action for damages for personal injuries. The Court below entered judgment for the defendant *n. o. v.*

> "In a negligence case where the oral testimony on the part of the defendant as to an independent contract under which the work was done is not in itself improbable, is not at variance with any proof or admitted facts or with ordinary experience, and comes from witnesses whose candor there is no ground for doubting, a jury ought not to be permitted to indulge in a capricious disbelief of their testimony and binding instructions for the defendant are proper.
>
> "That it [the contractor] the contractor actually did the work as an independent contractor was clearly established by the testimony of Nelson and Acklin, the latter being foreman of the Contracting Company. These were two entirely disinterested witnesses, and the jury could have no reason for doubting their candor or questioning their credibility.
>
> "Judgment affirmed."

Timlin v. American Patriots, 249 Pa. 465.

There the jury capriciously disbelieved a candid and credible witness. On a writ of error is was held that the trial Court ought to have given binding instructions for defendant, and, not having done so, ought to have entered judgment for the defendant.

The error assigned was the refusal to direct a verdict for defendant. In reversing the judgment the Court said:

> "The testimony offered by the defendant to defeat a recovery against it was of a nature to do so; the date of the death of Dr. McLæan, as established by the testimony of Dr. Bessey, was not at

variance with any proved or admitted fact, and there was no ground for doubting the candor of the witness who fixed it. The jury ought not to have been permitted to capriciously disbelieve him on a material matter, but should have been instructed that the plaintiff could not recover: *Longer v. Lehigh Valley R. R. Co.*, 196 Pa. 610."

McNeir v. Wallace, 252 Pa. 323, 325.

In that case the defendant testified on his own behalf. The jury disregarded his evidence and found for the plaintiff. The trial Court entered judgment *n. o. v.* for defendant. The judgment was affirmed. The Court said:

"Under these circumstances the Court below was right in entering judgment for the defendant *non obstante veredicto*. A verdict which plainly indicates that the jury indulged in a capricious disbelief of the testimony, should not be permitted to stand."

CONCLUSION.

It is submitted:

(a) The admission of the unanswered, self-serving letter was error—

(a) Under all the authorities.

(b) Under the Conformity Acts.

The refusal of binding instructions for defendant was error—

(a) Because, if the letter was erroneously admitted, there was no evidence to prove the authority of the agent.

(b) Because, under the Conformity Acts, the jury could not reject the direct evidence of two credible witnesses that it had not been received, as held by the Pennsylvania decisions.

The judgment of the Circuit Court of Appeals

was not in uniformity with the decisions of other Circuits.

The failure of the Circuit Court of Appeals to follow, under the Conformity Acts, the settled rules of the Supreme Court of Pennsylvania,

(a) Rejecting unanswered, self-serving letters.

(b) Giving binding instructions for defendant on the ground that the direct evidence of two credible witnesses as in the present case could not be rejected by the jury.

The questions here involve uniformity in the Circuits and are "questions of importance which it is in the public interest to have decided by this Court of last resort."

FRANCIS RAWLE,
HENRY M. EARLE,
FRIEND HOAR,
JOSEPH W. HENDERSON,
For Petitioner.

CONTENTS.

	Page
Petition	1
Statement of Facts	5
The Bonds in Suit, List of	5
The Self-Serving Letter	7
The Self-Serving Letter Admitted	7
Reasons for Granting the Writ	11
Argument	13
An Unanswered Self-Serving Letter is Not Admissible in Evidence	17
Federal Cases	17
Pennsylvania Cases	20
English Cases	23
Cases in Various States	25
Roman Law	27
Conformity Acts	30
Binding Instructions Should Have Been Given	38
Conclusion	40
Opinion of Circuit Court of Appeals	

TABLE OF CASES.

Allan v. Peters	15
Amer. Agricult. Chem. Co. v. Hogan	34
Amer. Issue Pub. Co. v. Sloan	34
B. & O. R. Co. v. Baugh	36
Biggs v. Stueler	29
Bucher v. Cheshire R. Co.	30
Chicago v. McKechney	29
Chicago & N. W. Ry. Co. v. Kendall	26, 30
Davis v. Gray	30
Dempsey v. Dobson	21
DuPont de Nemours & Co. v. Tomlinson	32
Ex parte McNeill	30

TABLE OF CASES—Continued

	Page
Fraley v. Bispham	20
Franklin Sugar Co. v. Luray Supply Co.	35
Geskill v. Skene	15
Gray v. Kaufman	26
Haller v. Werner	21
Hamilton Shoe Co. v. Wolf Brothers	17
Hammond v. Beeson	27
Harris v. Egger	20
Hill v. Pratt	27
Kann v. Bennett	22
Kumin v. Fine	25
Lonzer v. Lehigh V. R. Co.	38
Lynn Storage Co. v. Senator	27
McNeir v. Wallace.	40
Magnum Co. v. Coty	17
Morris v. Norton	15, 20
Meyers, et al. v. Moore Kile Co.	34
Nashua Savings Bank v. Anglo-American Co.	30
Nicholls v. Webb	29
Parker v. United States	17
Richards v. Gellatly	23
Roman Law	27
Rumble v. United States	18
Seevers v. Cleveland Coal Co.	27
State v. Howell	26
State Bank v. McCabe	27
Thomas v. Jones (1920) 2 K. B. 399	24
Thomas v. Jones (C. of A.)	24
Thrush v. Fullhart	19
Timlin v. Amer. Patriots	39
Viele v. McLean	26
Walters v. Amer. Bridge Co.	39
Wiedemann v. Walpole	23
Woolsey v. Haynes	19

Office Supreme Court, U. S.
FILED
OCT 22 1927
CLERK

No. 78.

IN THE

Supreme Court of the United States

A. B. LEACH & CO., INC., Plaintiff-in-Error,

vs.

WALTER PEERSON, Defendant-in-Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR APPELLEE.

JOHN ARTHUR BROWN,
HENRY P. BROWN,
For Appellee.

INDEX

	Page
Brief for respondent	1
I. The certiorari should be dismissed because improvidently granted	1
II. None of the defendant's assignments of error in the circuit court of appeals should be sustained	9
Conclusion	22

TABLE OF CASES CITED

Allan v. Peters, 4 Phila. 78	5
Atlantic Coast Line R. R. v. Mims, 242 U. S. 532	3
Auringer v. Cochrane, 225 Mass. 273	20
Biggs v. Stincher, 36 Md. 300	14
Baker Perrine Co. v. Kelley, 243 Mass. 327	21
City of Chicago v. McKechney, 206 Ill. 372	14
Cosgrove v. Hunnicutt, 54 Pa. 268	6
Dempsey v. Dobson, 174 Pa. 125	4, 14
Fraley v. Bispham, 10 Pa. 320	4, 5, 14
Gifford v. Gifford, 244 Pass. 302	21
Glatfelter v. Mendels, 46 Pa. Super. Ct. 502	6
Gold Mining Company v. National Bank, 96 U. S. 640, at 644	17
Guertin Stone Company v. Cattle Construction Co., 248 U. S. 334, 338	12
Hershey v. Love, 278 Pa. 161	6
Jacobs v. Southern Railway Co., 241 U. S. 229, 230	12
Kann v. Bennett, 223 Pa. 36	5, 14
Kunde v. Fine, 226 Mass. 75	14
Lasse Bowler Corporation v. Western Webb Works, 261 U. S. 387	8
Leach v. Peirson, 16 Fed. (2d) 86, at 87	12
Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13	3
Marino v. Vecchio, 85 Pa. Super. Ct. 377	14
McDermott v. Severe, 202 U. S. 600, 610	12
McNally v. 301 Madison Ave. Corp., 211 N. Y. S. 25	14
Morris v. Hanely, 3 Fed. (2d) 907	18
Morris v. Norton, 75 Fed. Rep. 912	20
Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 120	12
Parker v. United States, 166 Fed. 966	14
Pennsylvania R. R. Co. v. Minds, 250 U. S. 368	12

	Page
Philadelphia etc. R. R. Co. v. Cowell, 28 Pa. 329	7, 17
Sievers v. Coal Co., 158 Iowa, 524	14
Selig v. Belfuss, 196 Pa. 200	6
State v. Howell, 61 N. J. L. 142	14
State Bank v. Mosely, 135 Mich. 429	14
Sturtevant v. Wallack, 141 Mass. 119	20
Thrush v. Fullhart, 230 Fed. 1	14
United States v. U. S. Fidelity Co., 236 U. S. 512, 529	12
Vicle v. McLean, 206 N. Y. 260	14
Woodley v. Haynes, 165 Fed. 201	14

TEXT BOOKS CITED

Mechem on Agency, Vol. I, Sec. 454	16
Sec. 830	19
Story's Agency, Sec. 80	18
Williston on Contracts, Sec. 278	16

OTHER AUTHORITIES CITED

2 Corpus Juris, 648	16
69, Sec. 116	19
3 Corpus Juris, p. 725, Sec. 459	5

In the Supreme Court of the United States.

OCTOBER TERM, 1927. No. 78.

A. B. Leach & Co., Inc., Plaintiff in Error,

vs.

Walter Person, Defendant in Error.

ARGUMENT.

I.

The Certiorari Should Be Dismissed Because Improvidently Granted.

The petition for the certiorari was based on the diversity of judgments of the several Circuit Court of Appeals as to whether or not the Conformity Acts apply to the state rules of evidence.

It is contended by plaintiff in error that the trial Judge committed an error in admitting evidence a certain letter written and mailed by defendant in error hereinafter called plaintiff to plaintiff in error hereinafter called defendant

and admitted for the plaintiff over the defendant's objection. Defendant contended the letter was self-serving and therefore inadmissible when offered by the plaintiff, under the law of evidence as administered generally throughout the United States and England. Neither in the District Court nor in the Circuit Court of Appeal was it suggested by defendant that there was a special rule of law provided by statute or legal decision in Pennsylvania relating to the admissibility of self-serving statements, and that such state rule or law was binding upon a federal court sitting in Pennsylvania. In its brief of argument (p. 17), in the Circuit Court of Appeals defendant contended that the letter was inadmissible under the "Universally Settled" rule of law regarding self-serving statements. In support of its claim that the rule was "universally settled" defendant's brief of argument in the Court of Appeals quoted from decisions in the different jurisdictions in the following order: 6 federal cases, 3 from Pennsylvania, 5 from England, 6 from Massachusetts, 8 from New York, 2 from Illinois, 2 from New Jersey, and 7 from other states. There was no suggestion that the Pennsylvania cases established or exhibited any special local rule which under the Conformity Acts was binding on federal courts sitting in Pennsylvania. They were cited with 34 cases from other jurisdictions in support of a general rule of the law of evidence which it was claimed by defendant the trial Court had refused to apply when admitting in evidence the self-serving letter.

It is not without significance that when defendant came to prepare its brief in this Court it did not follow its practice in the courts below in the manner of citing cases on the subject of self-serving letters. Instead the Pennsylvania cases were cited in support of a Pennsylvania rule and cases on the same subject in other jurisdictions were placed under the special heading "additional cases on self-serving letters unanswered."

It appears to be well settled that the defendant cannot raise in this Court a question of law not raised in the District Court nor in the Circuit Court of Appeals.

Louisville & Nashville Railroad Company vs. Parker, administrator, etc., 242 U. S. page 13.

In that case the defendant failed to raise in the trial court the applicability of the Federal Employers Liability Act. The case went to the jury as one dependent on the State law and there was a verdict which admittedly could not be sustained if the Federal Employers Liability Act applied.

The failure of the Court to apply the Federal Employers Liability Act was made the ground of appeal to this court. In sustaining the verdict, this Court held that as the defendant had not raised the question of the applicability of the act in a proper manner nor had made any request or objection in the trial court which was not rightly overruled, the defendant could not raise in this court the applicability of this act.

Atlantic Coast Line Railroad vs. Mims, administratrix, 242 U. S. 532, the same question was considered, and it was held that this court was without jurisdiction to review the judgment of a State court upon the ground that a Federal right was denied, when the claim of Federal right relied on was refused consideration in the State court because it was not asserted at a proper time or in a proper manner under the established State system of pleading and practice.

The same principle is stated in 3 Corpus Juris, page 723, Section 619:—

> "When a case is tried by both parties upon the theory that the law of the forum governs, a party cannot, on appeal, take the position that the laws of another State should have been applied. And, where the trial is had in accordance with State law, it cannot be urged for the first time, on appeal, that a Federal statute should govern."

If the defendant had raised in the District Court or in the Court of Appeals the question of the duty of federal

courts under the Conformity Acts to apply local state rules of evidence, neither the cases cited nor any other cases in Pennsylvania can be found to support the statement that in Pennsylvania there is a settled rule of law that under no circumstances and for no purposes is a letter written by the party offering it to the opposite party admissible, if it contains any matters of a self-serving character and is unanswered.

All that the Pennsylvania cases cited by defendant decide is that *upon the facts of those cases* the letter offered in evidence by the writer was not admissible. A statement of these Pennsylvania cases cited by defendant, follows:

> In **Fraley vs. Bispham,** 10 Pa. 320, in a suit by a vendee against a vendor of goods, the former offered in evidence a letter written by him to the vendor, charging that by reason of a breach of warranty as to the character of the goods, the plaintiff had suffered a certain money loss and requesting payment of this sum. In sustaining the exclusion of this letter the Supreme Court said:—
>
> "I regard the paper as nothing more than a specification of damages, sustained upon an alleged breach of contract on the part of the defendant, of which the defendant was bound to take no notice, by the usages of trade, or mercantile law."

In **Dempsey vs. Dobson,** 174 Pa. 123, one employed by defendant to experiment with colors and to record his results in a "color book," sued to recover a copy of the book which defendant had made after the termination of the employment. The Court below admitted in evidence a letter written by plaintiff to defendant of which the Supreme Court said:—

> "It was an argumentative presentation of his view of his rights as an employee and of the grievance of

which he complained. It was unanswered. It was the declaration of the plaintiff in his own behalf and was no more admissible because reduced in writing than it would have been if delivered orally. The point is substantially ruled in Fraley *vs.* Bispham, 10 Pa. 320."

In **Kann vs. Bennett,** 223 Pa. 36, an owner sued a contractor on a building contract alleging improper delay in performance and a loss on completion of the work by the plaintiff. At the trial the plaintiff was allowed to put in evidence letters written by plaintiff's architect and agent to the defendant, in which were set forth at length the defendant's default and a threat to resume possession of the premises and complete the work. The Supreme Court said:—

"They set forth an argumentative presentation of the plaintiff's contention, and there seems to be nothing in the record to show that they were actually received, or were ever replied to in any manner by the defendant. The letters therefore amounted to nothing more than declarations in his own behalf, and as such they should not have been admitted in evidence."

In its brief filed in this Court, the defendant quotes (on page 25) from the decision in the case of **Allan vs. Peters,** 4 Phila. 78.

In that case the Court held that an unanswered self-serving letter will be admitted in evidence to show a demand or notice if one of these be requisite, and the statements do not go beyond what is necessary to render the demand or notice intelligible. In other words an unanswered letter by one party to another is not made inadmissible by a self-serving statement contained therein if such letter served any necessary and proper function in the proof of the case of the party offering it.

At this point in the argument, it may be remarked that it is not necessary for plaintiff to contend that under the facts in the case at bar the letter was admissible either under the Pennsylvania decisions or under the rule to be deduced from the decisions generally. In this jurisdictional section of the argument it is submitted that it is enough to show that there is no absolute, inflexible rule in Pennsylvania as contended by defendant by which every unanswered letter is rendered inadmissible for the writer, regardless of the purpose for which it was offered or the other facts and circumstances in the case.

The following Pennsylvania cases deal with the admissibility of such a letter.

In **Hershey vs. Love,** 278 Pa. 161 (a case not cited by counsel for the defendant), the Supreme Court of Pennsylvania distinguished the case before it from several others in which unanswered self-serving letters were admitted in evidence in the higher courts of that State upon different states of fact. The Supreme Court said (p. 164):—

> "Situations do arise, where correspondence is admissible, though phrases appear therein favoring the contention of the one presenting it, as in the case of the production of a letter necessary to show a demand for payment (Crossgrove vs. Himmelrich, 54 Pa. 203), return of property claimed (Glattfelter vs. Mendels, 46 Pa. Super. Ct. 502), or requesting the other party to take certain steps legally required. Selig vs. Rehfuss, 195 Pa. 200."

In **Crossgrove vs. Himmelrich,** supra (54 Pa. 203), in a suit to recover the consideration paid to defendant under a contract, a letter written by plaintiff to defendant giving him written notice of rescission and stating the facts as to the contract, payment and breach, was admitted in evidence for the plaintiff. The Supreme Court said of this letter:—

> "The objection was that it contained declarations of the plaintiffs in their own favor. Suppose it did,

it was made to the faces of the defendants, and not behind their backs, and they might have denied the truth of any declaration in it and required proof if they thought proper."

No decision in Pennsylvania can be found which undertakes to set forth all the conditions under which and purposes for which unanswered self-serving letters may be given in evidence for the writer. The only warranted deduction from the Pennsylvania cases cited by the appellant or any other cases to be found in that jurisdiction, is that upon the facts in some cases such letters were held inadmissible, while in other cases, where the facts were different, and the purposes of the proof were different, the letters were held admissible. Therefore any general rule in Pennsylvania decisions relating to the exclusion of self-serving letters is too general and vague and requires too much in the way of interpretation and application to the facts, to require a Federal Court sitting in that State to recognize and apply it under the Conformity Acts.

In a later portion of this brief it will be shown that the fundamental question in the case at bar is one of agency, and that the rule of evidence is incidental to and dependent upon that question. If a principal advised of an unauthorized exercise of his agent's authority, is required to repudiate his act and restore the consideration he has received, such letter may be received to show notice, and the fact that in giving such notice the letter necessarily states facts favorable to the writer cannot render it inadmissible.

The case of **Phila. etc. R. R. Co. vs Cowell,** 28 Pa. 329, in allowing a jury to find a ratification by silence after one has been informed that another without authority has assumed to act on his behalf, completely disposes of defendant's argument that under the Pennsylvania decisions there can be no ratification inferred from the silence of the receiver of a letter addressed to him by the party offering it.

The argument to be made later in this brief is anticipated and the Cowell case is cited merely to show that the admissibility of the letter of May 9 and its effect cannot be determined by applying directly under the Conformity Acts any general rule of evidence of the state court.

It is, therefore, submitted that it is not necessary to consider whether there is a diversity of decisions in the different circuit courts on the question whether the Conformity Acts require federal courts in common law trials to follow the rules of evidence of the state courts in which the trial is held, because

(1) In the District Court no attempt was made to show a local rule of evidence binding on that Court, and no assignment of error in the Circuit Court of Appeals was taken to the failure to follow the rule of evidence of the local court; and

(2) Even if the decisions of Pennsylvania courts had been cited by defendant in support of a distinctive local rule of evidence, these cases fail to show any such rule.

It is, therefore, submitted that the certiorari granted in this case should be dismissed as was done in **Layne Bowler Corporation vs. Western Webb Works,** 326 U. S. 58.

In that case after a writ of certiorari had been allowed by this court to settle a supposed conflict of decisions between two circuit courts of appeals concerning the validity and scope of a patent, after the filing of briefs and argument, in an opinion by the present Chief Justice, this court upon consideration held that the writ of certiorari had been improvidently granted because such conflict did not exist. The writ of certiorari was therefore dismissed without consideration of the merits of the case.

II.

None of the Defendant's Assignments of Error in the Circuit Court of Appeals Should be Sustained.

If this Court declines to dismiss the *certiorari* as improvidently granted and the case is heard on the assignments of error filed in the Circuit Court of Appeals, it becomes necessary to determine which of those assignments were properly taken and can therefore be made the subject of defendant's argument before this Court. This requires a summary statement of the undisputed facts and the testimony in the District Court.

On three separate occasions between June, 1920, and February, 1921, plaintiff purchased from defendant different bonds. In each case the order to purchase was procured through the same salesman, Mather, an employee of defendant, and each order was given in reliance upon Mather's agreement at the time, that if at any time the plaintiff so desired, the defendant would take back the bonds at the purchase price (R. 10, R. 19, R. 24).

In May, 1921, plaintiff, finding he could not use some of these bonds as collateral, mailed to defendant the following letter (R. 36):—

"May 6, 1921.

"*Messrs. A. B. Leach & Co., 115 South 4th St., Philadelphia.*

"Dear Sirs:—When I purchased from you the Mass. Oil & Ref. Co. Bonds it was agreed by Mr. Mather if at any time I so desired you would take them off my hands at cost 98.

"I have need of some money and will avail myself of this privilege.

"When shall I deliver them to you.

"Very truly yours,

"WALTER PEIRSON."

The following day May 10, 1921, Mather called the plaintiff on the telephone (R. 37), and when plaintiff informed him of his difficulty, Mather said that the bonds were "as good as wheat," and that defendant would make a loan on them (R. 37). The next day May 11, 1921, defendant did lend plaintiff $15,000 on the security of the bonds at a face value of $20,000 (R. 37). At this time the bonds had not depreciated in value (R. 108). This was the only time defendant had ever loaned money to any of Mather's customers (R. 98).

In March, 1922, when plaintiff received a demand for repayment of the loan he called Mather on the telephone and the latter said that the demand was only a matter of form and that the loan should be allowed to run (R. 41-42).

When in April, 1922, plaintiff received a second demand he mailed to defendant the following letter on April 21, 1922 (R. 44):—

"APRIL 21, 1922

"*Mess. A. H. Leach & Co., 115 South 4th St., Philadelphia.*

"DEAR SIR:—When the 20,000 Massachusetts Oil & Refining Bonds were bought from you it was expressly agreed that at any time I desired, you would take them off my hands at cost.

"This I now ask you to do, calculate the interest deduct the loan and mail me check for balance due.

"Very truly yours,

"WALTER PERSON."

The next day, when plaintiff demanded of the defendant's vice-president Miller that all the bonds be taken back in accordance with Mather's agreement, Miller said that "Mather denied ever having made such an agreement" (R. 44).

On July 14, 1922, plaintiff made a formal written demand on defendant to retake all the bonds. Suit was

brought to recover the difference between the purchase price of the bonds and their market value on this date.

At the trial, against defendant's objection that the letter of May 9, 1921, was self-serving, the Court admitted it in evidence (R. 36). This was the only objection made by defendant to its admission.

The only request for charge made by defendant at the trial was for a directed verdict, and this was refused (R. 133).

There was a verdict for plaintiff for the amount claimed of $14,726.25, after allowing defendant credit for the loan of $15,000 with interest thereon (R. 1-8, 130).

In the Circuit Court of Appeals defendant assigned for error (R. 141):

1. The Court's overruling defendant's objection to the offer of proof of the letter of May 9, 1921;

2. The admission of this letter;

3. The refusal of a directed verdict;

4. The Court's instructions that the defendant's receipt of the letter of May 9, 1921, would be notice of Mather's agreement, and a failure to deny the latter's authority or that he made such agreement would justify an inference of acquiescence in what he had done; and

5. The Court's refusal to order plaintiff to produce his income tax returns.

In the brief filed in this Court (p. 8), in the "specifications of error intended to be relied upon," appellant names:

1. The admission of the letter of May 9, 1921;

2. The refusal of binding instructions;

3. The admission of the letter of May 9, 1921, and the Court's instruction to the jury thereon, including the Court's failure to notice in such instruction the fact that the letter related to only one of the three purchases of bonds; and

4. The entry of judgment for the plaintiff and against the defendant.

It is submitted that only the first two errors specified are available to the appellant. At the trial the only exception taken by defendant to the charge of the trial Court was the refusal to direct a verdict for the defendant. The defendant at that time withdrew all its requests for charge except the request for binding instructions (R. 133, R. 126).

This request for binding instructions did not amount to more than a general exception to the charge of the trial court. It is well settled that such an exception is insufficient and that exceptions to the charge of the trial Judge must be specific in order that a trial court may be given an opportunity to correct errors and omissions before the same are made the basis of error proceedings —

Pennsylvania Railroad Company vs. Minds 250 U. S. 368. Mr. Justice Day there said, page 375 —

> "This court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. McDermott v. Severe, 202 U. S. 600, 610; Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 120; United States v. U. S. Fidelity Co., 236 U. S. 512, 520; Jacobs v. Southern Ry. Co., 241 U. S. 229, 230; Guerini Stone Co. v. Carlin Construction Co., 248 U. S. 334, 338. Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter."

At the close of the opinion in the Circuit Court of Appeals (**Leach vs. Peirson,** 16 Fed. (2nd) 86, at page 87) Judge Buffington said (R. 140) —

> "We may add that we have not overlooked the fact that the court in admitting the letter did not limit its

effect to the bonds mentioned therein, but as such point was not raised either in objections to testimony or exceptions to charge, the matter is not before us for review."

The only questions therefore to be considered are (1) the admissibility of the letter of May 9, 1921, and (2) the failure of the Court to direct a verdict for defendant.

There was no error in admitting in evidence the letter of May 9, 1921, nor in holding that defendant's failure to reply to it, under the facts in the case, was some evidence from which the jury might find ratification of the contract of repurchase made by defendant's agent Mather.

The defendant contended that the letter was self-serving and that all self-serving letters were inadmissible, and that irrespective of the circumstances there was no duty on the part of the defendant to reply, and therefore the jury had no right to draw any unfavorable inference from its failure to do so.

This argument does not discriminate between a self-serving letter written after the transaction is closed and one written in the course of the transaction; between a letter making a demand or giving some other information necessary to preserve the rights of the writer, and an argumentative demand to redress an alleged wrong. Neither does defendant's argument take into consideration the situation of the parties, and whether, after the defendant had received the information contained in the letter, any legal consequences attended its failure to reply or its failure to take some action.

The cases cited by defendant do not make these distinctions because they were not called for by the facts in those cases.

The cases cited by defendant may be divided into several groups.

(1) Where the letters were written after the contract had been fully performed or the transaction closed, and in some of these cases this fact was referred to by the Court as the ground of exclusion.

The letter was written subsequent to the close of the transaction in **Fraley vs. Bispham,** 10 Pa. 320; **Dempsey vs. Dobson,** 174 Pa. 123; **Kann vs. Bennett,** 221 Pa. 80; **Packer vs. U. S.** 166 Fed. 666; **Woolsey vs. Haynes,** 165 Fed. 901; **Thrush vs. Fullhart,** 210 Fed. 1.

(2) In the following cases the fact was referred to that the letter contained an argumentative presentation of the writer's case against the other party. **Dempsey vs. Dobson,** 174 Pa. 122; **Kann vs. Bennett,** 221 Pa. 80; **Viele vs. McLean,** 200 N. Y. 266; **City of Chicago vs. McKechney,** 205 Ill. 472.

(3) In other cases the letters were excluded because their only purpose was to inform the receiver that if he did not accede to the writer's demands he would be held liable. **Kumin vs. Fine,** 229 Mass. 75; **State vs. Howell,** 91 N. J. L. 142; **Biggs vs. Stueler,** 91 Md. 106; **Seevers vs. Coal Co.,** 158 Ia. 574; **State Bank vs. McCabe,** 148 Mich. 470; **Marino vs. Vecchio,** 81 Pa. Super. Ct. 377; **McNally vs. 301 Madison Ave. Corp.,** 211 N. Y. S. 25.

It is not contended by plaintiff that all self-serving letters unanswered are admissible in evidence, or that the receiver's failure to answer every letter addressed to him by his opponent can be taken by the jury as an admission of the truth of the matters contained in it. It is contended by plaintiff that when a letter is written in the course of the performance of a contract, to enable the writer to avail himself of some right under the contract, or to give some notice that may be necessary to establish his claim in court, or meet some defense raised against his claim, such letter is admissible for the writer if its terms do not go beyond the demand or notice with the explanation necessary to render it intelligible. The effect of this notice or demand

will depend on the substantive law applicable to the facts of the case and the situation of the parties.

It is submitted that the letter at bar was not purely self-serving. At the time it was written there was no breach, not even a controversy between the parties; it was written to secure performance of the contract; there is nothing in it to suggest that it was written by the plaintiff with a view of making evidence for himself, nor was there anything to indicate that it was used at the trial to enable the plaintiff to have the benefit of his statement out of court, of the contract made with the agent, Mather. There had been sufficient proof of Mather's making the agreement.

We, therefore, contend that the letter of May 9, 1921, is not inadmissible under the authorities cited for appellant.

The facts of the case and the situation of the parties which are relied upon to sustain the admission of the letter and also its subsequent use when unanswered as evidence of ratification, are as follows:—

The plaintiff had paid for bonds purchased from defendant on the faith of an agreement made with its agent. Before any breach and to avail himself of the benefit of this agreement, plaintiff sent the letter. When the defendant received the letter it learned of the conduct of its agent. While the letter called for performance of the agent's agreement, such performance did not impose any greater liability on defendant than a rescission of the contract. The bonds in question had not depreciated at that time. Without any loss to itself, defendant could have retaken the bonds at the purchase price. By its silence on this subject and making the plaintiff the loan on the bonds, the defendant deferred meeting the issue as to whether the agent had authority to make the agreement. If plaintiff had failed to prove that defendant had notice of its agent's agreement until after the bonds had depreciated in value, defendant could have set up by way of defense that it was not bound to allow a rescission of the sale on such terms as would impose a loss on it. There-

fore, it became necessary for plaintiff to show notice of the agent's agreement and the terms of such notice.

The duty of the defendant on receiving the letter was then determined by the law of agency. Its silence was some evidence of ratification.

In **Williston on Contracts,** Sec. 278, it is said —

> "Ratification like original authority need not be express. Any conduct which indicates assent to the transaction is sufficient. Even silence with full knowledge of the facts may operate as a ratification. The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty to undeceive him."

In **Mechem on Agency,** Vol. 1, Sec. 454, it is said —

> "But even though silence may not be *per se* conclusive, and even though estoppel be for the time being excluded, it is entirely safe to say that silence or a failure to repudiate may often be evidence of an assent, more or less strong under the circumstances, from which as a matter of fact, an inference of assent may be drawn. The question seems to be this: From the failure to dissent under the circumstances, would the ordinarily intelligent man be justified in inferring that the principal assented? Like other similar questions, this would be for the jury unless reasonable men could fairly draw only one inference from the facts, and in that case the court may decide it."

In **2 Corpus Juris,** 508, it is said —

> "Mere silence or delay on the part of a principal in repudiating the unauthorized act of an agent does not necessarily amount to a ratification, but while it is not necessarily conclusive evidence of a ratification,

unless it cannot be explained on any other theory, it is always an element to be considered in connection with other evidence tending to show a ratification, and may alone be sufficient to justify a finding of ratification, particularly where the circumstances impose a special duty upon the principal to speak, as where the other party is liable to be misled or injured by his failure to do so."

In **Gold Mining Co. vs. National Bank,** 96 U. S. 640 at 644 the Supreme Court said:—

"That if acts have been done by an agent in excess of his authority, and the principal on being informed of them fails to disavow them in a reasonable time, his silence may be considered as an acquiescence in and assent to the acts done."

In **Phila., Wilmington and Baltimore R. R. Co. vs. Cowell,** 28 Pa. 329, a director of a railroad company subscribed for new stock in the company for one who was already a large holder of stock in the company and who was living abroad at the time, and immediately notified him of the subscription. The latter never made any reply either to the railroad company or to the one who had thus acted on his behalf. Accruing dividends on the original stock were applied by the company to the payment of the stock subscription. Seven years afterward he demanded these dividends and sued for their recovery, alleging that the stock subscription was unauthorized. These facts were contained in an offer of proof which was rejected and a verdict was directed for the plaintiff. In reversing, the Supreme Court said (p. 330):—

"The most material circumstance in the offer was the silence of Mr. Cowell. Fully informed about the last of the year 1848 as to what had been done in his name, and the motives and reasons for doing it, he did not condescend to reply for nearly seven years.

It is insisted that this fact even when taken in connection with the other circumstances in the offer, was no evidence of his intention to assent to the new subscription.

"'It is a clear principle of equity that where a man stands by knowingly, and suffers another person to do acts in his own name without any opposition or objection, he is presumed to have given authority to do those acts. *Semper, qui non prohibet pro se intervenire, mandare creditur.* Story's Agency, Sec. 87.

"'We do not apply the full strength of this principle when we rule that the party's silence, in connection with the circumstances offered, was evidence fit for the consideration of a jury on the question of ratification. If mental assent may be inferred from circumstances, silence may indicate it as well as words or deeds. To say that silence is no evidence of it, is to say that there can be no implied ratification of an unauthorized act, or at least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justify such a conclusion. A man who sees what has been done in his name and for his benefit, even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself, and if the power to ratify be conceded to him, the fact of ratification must be provable by the ordinary means.'

In **Morris vs. Handy,** 3 Fed. (2nd) 67, there was some evidence that defendant's president and also its manager knew that its agent without authority had purchased merchandise in its name, and that without knowledge of all the facts its manager had given a formal ratification. With this knowledge there was no disaffirmance for some days. Held by the Circuit Court of Appeals, that it was for the jury to say whether this conduct amounted to ratification.

Again, when defendant received the letter, if he did not approve and accept his agents contract, it was his duty to inform the plaintiff, and return the consideration and take back the bonds, for this is all the letter called for. Ratification was therefore to be inferred from the failure to restore the consideration.

In **Mechem on Agency,** Vol. 1, Sec. 430, it is said:—

> "When the principal discovers that there has come into his hands the proceeds of an unauthorized act of one who assumed therein to act as his agent, to voluntarily retain such proceeds is ordinarily to ratify the act."

In this case there was evidence on the part of the defendant that the bonds were still selling in May, 1921, for the price plaintiff paid for them. Therefore there was no change in the circumstances such as would excuse the defendant from restoring the consideration. (Sec. 430 and 439.)

In **2 Corpus Juris** 406, Sec. 116, it is said:—

> "The rule of ratification by the acceptance of benefits implies the power of election to accept or reject what has been received, and when the principal has suffered no prejudice and can make restitution, he should, when apprised of the facts, make his election, and if he decides not to ratify he should return the fruit of the unauthorized act, and if he does not do so within a reasonable time, but retains, uses or disposes of what he has received, he will be held to have ratified the act of the agent."

In support of the text many cases are cited from the different state courts.

In the same section it is also said —

> "This rule applies notwithstanding a previous denial, upon learning the facts, of the agent's authority, or expressions of disapproval or repudiation of his acts."

Some of the cases support a broader rule for the effect of a charge contained in an unanswered letter, and the rule is said to be that "where a charge is of such a kind that according to the common experience a man would naturally repudiate it, if unfounded, the fact that it was made and not repudiated may be left to the jury." This quotation is from the opinion of Holmes, J., in **Sturtevant vs. Wallack,** 141 Mass. 119.

In the above case, suit was for the price of a machine which was to be used in a building erected by the defendant. The machine had been ordered by a third person on defendant's account and the issue was his authority so to do. There was evidence that the machine was shipped to defendant distinctly marked with his address and bills were repeatedly sent to him and a letter demanding payment, to all of which he made no reply. Held, that this evidence was properly left to the jury.

In **Morris vs. Norton,** 78 Fed. Rep. 910, Lurton, J., said that while

> "unanswered statements in letters are seldom to be regarded as admissions by the person addressed, exceptional circumstances may justify the court in submitting them to the jury with a proper caution."

In **Auringer vs. Cochrane,** 228 Mass. 273 (1917), a dressmaker furnished gowns to defendant's minor daughter on the orders of the latter's wife. At the end of the month he sent a letter and a bill and received no reply. At the end of the second month he sent a second letter and a bill including items for the purchases in that month; and receiving no answer, at the end of the third month a third bill and letter were sent and receiving no answer, plaintiff wrote to defendant demanding an answer and settlement.

Sitting without a jury the Court found for the plaintiff. In overruling exceptions, the Supreme Court said:—

> "The letters were admissible. They were not under the circumstances self-serving declarations, but statements of the defendant's contractual relations to them, which rested on the statements of his wife."

In **Boice-Perrine Company vs. Kelley,** 243 Mass. 327 (1923), plaintiff's salesman who had sold goods to defendant, received less than the full amount in payment and receipted the bill. Afterward, plaintiff's bookkeeper sent a bill to defendant and on being told of the payment to the salesman, said that the sending of the bill was a mistake. Nothing further was done for several months when payment was demanded. A verdict was directed for plaintiff. In ordering a new trial, the Supreme Court said (p. 330):

> "There was evidence from which ratification by the plaintiff of the unauthorized act of its agent might have been inferred. Although it is somewhat slender, the case should have been submitted to the jury upon this point. It is the instant duty of a principal, upon ascertaining the facts, at once to disaffirm an act done in his name by an agent in execution of a power conferred but not in a mode sanctioned by the terms of the agency or in excess or misuse, of the authority given. Prompt disavowal of such an act is imperative because the inference of authority flows readily from the trust reposed by a principal in his agent. Harm to the victim of such unauthorized conduct of an agent may be repaired or mitigated by immediate knowledge of the denial of responsibility by the principal."

Gifford vs. Gifford, 244 Mass. 302, was an action by a wife against her husband for separate maintenance. The husband offered in evidence a letter written by him in which he asked his wife to live with him, that his means were reduced so that if she re-

maimed away from him he could afford only a small weekly payment. The trial court rejected the letter, but this was held error because it bore directly on the issue in the case.

In conclusion it is submitted

(1) The certiorari should have been dismissed because improvidently granted.

(2) The defendant has not, by objection to testimony or exceptions to charge, raised the question of limiting the letter of May 9, 1921, to the Massachusetts Oil Co. Bonds, and therefore this is not before this court for review.

(3) There was no error in admitting in evidence the letter of May 9, 1921, nor in holding that defendant's failure to reply to it, under the facts in this case, was some evidence from which they might find ratification of the contract of repurchase made by defendant's agent Mather.

It is, therefore, respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JOHN ARTHUR BROWN,
HENRY P. BROWN,
For Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 78.—October Term, 1927.

A. B. Leach & Company, Inc., Petitioner, vs. Walter Peirson	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[November 21, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit by Peirson against the petitioner upon an alleged agreement to repurchase at any time and at the purchase price bonds sold by the petitioner to the plaintiff. The petitioner is a bond house doing a large business, and the only evidence of its having made such a contract was the testimony of the plaintiff that Mather, a salesman, made the promise on the petitioner's behalf, coupled with a letter the admissibility of which is the question here. The purchases were on June 19, 1920, September 23, 1920, and February 28, 1921. The plaintiff testified that on May 9, 1921, he wrote to the petitioner that when he made the second purchase "it was agreed by Mr. Mather that at any time I so desired you would take them off my hands at cost 98. I have need of some money and will avail myself of this privilege. When shall I deliver them to you." The officers of the petitioner denied ever having received the letter and denied the authority of Mather to make any such agreement. It may be mentioned further, although it is not relevant to the question here, that Mather denied having made the contracts alleged. The letter was offered in evidence. It was objected to as a self serving document but was admitted subject to exceptions. There was no other evidence of Mather's authority, but the jury were instructed that if the petitioner received the letter and failed to disaffirm what Peirson said Mather had done they would be justified in finding that the petitioner acquiesced in the agreement and that Mather had authority to do what Peirson said he did. The plaintiff got a verdict and judgment and the judgment was affirmed by the Circuit Court of Appeals, 16 F. (2d)

86. On a suggestion of conflict between this and other Circuit Courts of Appeal and of failure to conform to the rule of evidence in Pennsylvania, (a failure in no way affected by the fact that the same rule prevails in most Courts of high authority,) as also of a difference among the Courts as to the scope of the Conformity Acts, a writ of certiorari was granted by this Court. 273 U. S. 676.

A man cannot make evidence for himself by writing a letter containing the statements that he wishes to prove. He does not make the letter evidence by sending it to the party against whom he wishes to prove the facts. He no more can impose a duty to answer a charge than he can impose a duty to pay by sending goods. Therefore a failure to answer such adverse assertions in the absence of further circumstances making an answer requisite or natural has no effect as an admission. *Fraley* v. *Bispham*, 10 Pa. 320. *Kann* v. *Bennett*, 223 Pa. 36, 47. *Packer* v. *United States*, 10 Fed. Rep. 906. *Woolsey* v. *Haynes*, 165 Fed. Rep. 391. *Thrush* v. *Pullhart*, 210 Fed. Rep. 1, 6. *Harris* v. *Egger*, 226 Fed. Rep. 389, 399. *Kuman* v. *Fine*, 229 Mass. 75. *Viele* v. *McLean*, 200 N. Y. 260. *Eschards* v. *Gellatly*, L. R. 7, C. P. 127, 131. *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534, 539. *Thomas* v. *Jones*, [1920] 2 K. B. 399, [1921] 1 K. B. 22.

There were no circumstances in this case to take it out of the general rule. The letter might have been admissible as a demand if a binding contract had been proved, but until evidence of Mather's authority was given the demand was immaterial. It is true that two days after that on which the plaintiff says that he wrote the letter that we have quoted the petitioner lent to the plaintiff $15,000 on the security of the $20,000 bonds in question with the usual powers of sale and the plaintiff's note. It would be the merest speculation to regard the plaintiff's story as confirmed by this loan. It may as probably have been an independent transaction, and it might be argued at least as plausibly that the plaintiff's note and assent to the severe conditions of a pledge to brokers was inconsistent with the right that he now asserts. No evidence having been given of Mather's authority to make the contract in suit the petitioner was entitled to a verdict. The request that one should be directed should have been granted. A new trial must be awarded.

Judgment reversed.